From:	Holly Scoggins
Sent:	Wednesday, January 3, 2018 1:41 PM
To:	Andrew Coombs;David Woods;Serhat Tanyolacar;Kristina Stafford;Katherine Gallagher;Pavel Amromin;Zack McGhin;Gabriel Fennmore
Cc:	Nancy Lozell
Subject:	Faculty Exhibition Artwork Request

Hi Art Faculty,

This is a notice that we will be having a Faculty exhibition on the Lakeland Campus during February and March. We are asking everyone to submit between 1-5 pieces (depending on the size) for the exhibition.

The artwork should arrive to the Lakeland Gallery no later than FEBRUARY 8TH
If you are doing an installation, you may install between February 5Th-9th. Please let me know the dimensions of the installation ahead of time.
Submit an inventory list to Nancy Lozell nlozell@Polk.edu, no later than February 8th Inventory list should include: Title, Artist name, Materials, Price if for sale, Insurance value (even if it is NFS), dimensions, and your contact info.

If you are shipping work, please ship to:

POLK STATE COLLEGE
ATTN: LTB ART GALLERY- Nancy Lozell
3425 Winter Lake Road
Lakeland, Florida 33803

Exhibit Dates	Feb. 12- March 16	Faculty Art Show	Reception: March 1 5-7pm

Holly Scoggins, MFA
Professor of Art
Polk State College
Hscoggins@Polk.edu
WFA 101A /station 8
863-297-1061 ex 5061

From: Serhat Tanyolacar <serhat@mail.usf.edu>
Sent: Wednesday, February 7, 2018 7:40 PM
To: Holly Scoggins;Nancy Lozell;Andrew Coombs
Subject: Open Letter After Polk State College Art Gallery's Decision

Open Letter to Polk State College:

I am an international artist, socio-political activist, civil rights defender, educator, and autism advocate. I sincerely believe that freedom of speech is an essential part of all civil societies, and that art is one of the most vital acts of free speech available to the civilian. As a professional artist I seek to engage the community with artwork that grapples with difficult socio-political topics. As a consequence, the content of the artwork is open to various interpretations, dependent upon demographics, geo-political locale, current events, and viewer access. In addition, the appeared controversy is an artistic strategy that I only use to engage multiple dialogues over the artwork.

Under certain conditions, art may seem offensive because it often engages and challenges the audience's existing views about sensitive and complex issues such as racism, gender bias, war, climate change, corporate citizenry, or sexual taboos—to name just a few themes pertinent to contemporary art since 1960. Art intends to trigger awareness about our society, an ourselves; it aims to open and develop dialogues about issues we usually avoid in our daily lives. Again, art is not meant to shut down or "close" the conversation; it means to present the audience with an opportunity to think, listen, speak, and learn.

One of biggest challenges in controversial artworks is that artists cannot predict and control the audience's reactions, or the level of reactions. One solution is to create an artwork that offends no one. (Is this even possible? Are opinions stagnant? Many of our beloved artworks were met with communal disgust when they were first unveiled. Picasso's monumental steel sculpture in Chicago's Daley Plaza and Maya Lin's Vietnam Veterans Memorial are two prime examples.)

Another option is to make art that is purely aesthetical or more like a literal, definitive statement, which might then profess a more straightforward stance on a particular topic. In this case, the work reads more like a slogan or "truism," both of which rarely produce engaging art. Many would define such literalism as propaganda—contemporary advertising assumes a more sophisticated reader. In my own projects, I aim to create fluid and varied discussions, without the artist's (my) authoritative voice or opinion as the default meaning of the work.

With my latest artwork, Death of Innocence, I am aiming to open dialogues over society's moral corruption and our moral dichotomy, which has led an unethical and immoral businessman to be the President of The United States. I fully

acknowledge the possible existence of the high school audience at Polk State College Art Gallery. However, censoring a work of art will only erode our primary purpose at this higher-education institution, which is educating the young generations.

Death of Innocence has both conceptual and visual layers, which may make it challenging for the audience to investigate the playfulness of the multiple layer existence. In fact, the representational image is not my artistic intend, but what activates it, and how the image triggers social engagement is.

I am hoping that Polk State College Art Gallery Administration will take this rare opportunity as an important educational moment, and support me to display Death of Innocence during the Faculty Art Show.

Serhat Tanyolacar

From:	Angela Garcia Falconetti
Sent:	Wednesday, February 28, 2018 10:17 AM
To:	Tamara Sakagawa
Cc:	Christine Lee
Subject:	RE: Keywords for searching

Received. Thank you.

Dr. Angela M. Garcia Falconetti, CFRE
President
Polk State College
agarciafalconetti@polk.edu
(863) 297-1098, Office
(863) 297-1053, Fax

POLK STATE COLLEGE

We are Polk.

From: Tamara Sakagawa
Sent: Wednesday, February 28, 2018 10:03 AM
To: Angela Garcia Falconetti <AGarciaFalconetti@polk.edu>
Cc: Christine Lee <CLee@polk.edu>
Subject: Keywords for searching
Importance: High

Between January 1, 2018 and today any emails to or from:

serhat@mail.usf.edu
stanyolacar@polk.edu

Any emails between January 1, 2018 and today with the terms:

"faculty art show"
"Serhat"
"Tanyolacar"
"NCAC"
"National Coalition Against Censorship"
"Foundation for Individual Rights"
"FIRE"
"AAUP"
"Death of Innocence"
"academic freedom"

"censorship"
"faculty exhibition"

There may be others, but those are the main ones from the emails.

Thx
t

POLK STATE COLLEGE

We are Polk.

Tamara Sakagawa
Assoc. VP of Communications and Public Affairs
999 Avenue H, N.E.
Winter Haven FL 33881-4299
863.292.3744 ext. 5359
tsakagawa@polk.edu

From: Angela Garcia Falconetti
Sent: Tuesday, February 27, 2018 3:17 PM
To: Atty. Don Wilson
Cc: Donald Painter;Christine Lee;Tamara Sakagawa;Stephen Hull
Subject: Fwd: Following up After Friday Meeting

Sent from my iPhone

Begin forwarded message:

> **From:** Serhat Tanyolacar <serhat@mail.usf.edu>
> **Date:** February 27, 2018 at 9:46:39 AM EST
> **To:** agarciafalconetti@polk.edu
> **Subject: Following up After Friday Meeting**
>
> CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.
>
> Dr. Falconetti,
>
> I apologize for my delayed response. For the last 10 days I have been thinking about what I need to write in this email to fully express how I have been feeling since our Friday meeting. I will not be political, and I will be ultimately honest as I have always been and always will be.
>
> You may still be wondering why I had such an unexpected response for a faculty art show at Polk State College. My academic, activist and artistic backgrounds may bring an understanding for my reasons as I have done works solely for a better society with conscious citizens. I still accept your apologize, because I know that you were genuinely honest. However, I was naively expecting an apology ,not for my discomfort, but for the reason of this discomfort.
>
> As an academic I have principles, and one of these principles, academic integrity, was violated bluntly in the Friday meeting. I have been always honest with my students, with my colleagues and with my audience, always... and I expect the same honesty and openness from al my colleagues too. Unfortunately I could not see the openness, transparency and respect in our meeting. There are multiple reasons/moments for this conclusion. The most significant ones happened during the last 10 minutes of the meeting.
>
> Prof. Scoggins' remark on measured/acceptable level of controversy was against everything what the 1st Amendment stands for: "There is a difference between controversial and too controversial" What defines too controversial in art? Our own moral authority? Political ideologies?... Her remark clearly makes me realized that the gallery director's emails were reflecting Holly Scoggins' opinions on how art should be and what art should be (in an authoritarian society).

After I asked all of you what you thought about the artwork. Both Prof. Scoggins and Dr. Painter took an offensive approach, which was not the right way to resolve this serious issue. If I cannot even talk about art with one of my colleagues because she/he is afraid of telling me her/his (biased) opinions in a professional meeting where is academic integrity and academic freedom?

Both Dr. Painter's and your remark in "protecting Prof Scoggins' rights" was a very sad and unforgettable moment in my academic career. Protecting another faculty, a full-time faculty, against another faculty is the very last thing that should be done in a transparent and peaceful work environment. Taking sides may only create an uncomfortable work environment for everybody. Protecting Holly Scogging's rights against myself?... against an artwork?... Taking sides is also such a belittling approach to show how much I was being valued at Polk State College. I believe that especially Dr. Painter has dismissed and forgotten that I have enough experiences in academia over many critical issues. Here, I must say that I deserve respect...

I came here with such hardship, with enormous sacrifices to help the art faculty, and to contribute to the entire school. I have no intention, no desire, no reason to create pointless controversies. Before coming to Polk State College I could have never imagined that we were having this conversation at this moment. Death of Innocence is a powerful work which criticizes our own moral dilemma, not only the moral corruption in politics, and it should have been valued highly especially by the art faculty who studied contemporary arts.

I am going to complete this semester because I respect my students, but I have no desire to teach here after spring semester even if I have no other employment opportunities. In my entire life I have lived with my principles, and I cannot give up on civilized and humane ideals and just pretend... This would be against everything I have believed in and fought for as a human being and as a progressive, brave and innovative educator.

I will not apologize for my response in this matter, because I know that I am only defending my rights (both my academic and constitutional rights). I also know that I am working for Polk State College to make things more open, more acceptable, and more civilized here. I always work for a better academia, and I know that this very process, which has been triggered by an artwork, will only make Polk State College a better, open, transparent and a progressive institution. I am hoping that it will not make the Art Faculty and the Administrators more authoritarian and more political in their decisions over academic (freedom) issues.

I wish you, all of our students, my colleagues and the entire Polk State College community my very best.

Respectfully Yours,

Serhat Tanyolacar

Serhat Tanyolacar

813-846-2692

www.serhattanyolacar.com

www.youtube.com/serhattanyolacar

skype: artserhat

From: Angela Garcia Falconetti
Sent: Tuesday, February 27, 2018 3:06 PM
To: Don Wilson
Cc: Drew Crawford;Christine Lee
Subject: RE: "Death of Innocence" // Proposed Legal Opinion and Response to Censorship Allegations

Don,

I reviewed the letter and thank you and Drew for your excellent work. Please send examples of case law in higher education, with examples to include Florida, that supports the College's non-display of the artwork.

Is it possible for you to send this by Friday?

Angela

Dr. Angela M. Garcia Falconetti, CFRE
President
Polk State College
agarciafalconetti@polk.edu
(863) 297-1098, Office
(863) 297-1053, Fax

POLK STATE COLLEGE

We are Polk.

From: Don Wilson [mailto:DHW@BosDun.com]
Sent: Friday, February 23, 2018 4:45 PM
To: Angela Garcia Falconetti <AGarciaFalconetti@polk.edu>
Cc: Drew Crawford <Drew@BosDun.com>
Subject: FW: "Death of Innocence" // Proposed Legal Opinion and Response to Censorship Allegations

From: Drew Crawford
Sent: Friday, February 23, 2018 4:07 PM
To: Angela Garcia Falconetti

Cc: Donald Painter; Peter Elliott; Tamara Sakagawa; Don Wilson
Subject: "Death of Innocence" // Proposed Legal Opinion and Response to Censorship Allegations

Dr. Falconetti:

Good afternoon! As requested, enclosed please find a draft letter to you regarding the "Death of Innocence" matter for your use and review. We have left the letter in draft form so as to tailor it appropriately to any audience that you feel is a necessary or required recipient.

I have included for you the suggested enclosure (a copy of Death of Innocence and the Faculty Art Show flyer) and a copy of the text of the cases we relied on in making our opinion. As you will see after your review, this type of dispute has happened in the past and we feel that we have a good legal ground to stand on if we should ever be required to make our case.

We are certainly open to finalizing the letter, signing it and sending you a formal copy if you think that is the appropriate next step.

If we can be of any further assistance to you on this matter, please let us know.

Very truly yours,
W.A. "Drew" Crawford

BOSWELL & DUNLAP LLP
ATTORNEYS AT LAW • EST. 1900

Boswell & Dunlap LLP | **Mailing:** Post Office Drawer 30, Bartow, Florida 33831-0030
Telephone: 863-533-7117 | **Facsimile:** 863-533-7412 | **Email:** drew@bosdun.com

---

From: Angela Garcia Falconetti
Sent: Friday, February 23, 2018 7:06 PM
To: Don Wilson
Cc: Drew Crawford
Subject: Re: "Death of Innocence" // Proposed Legal Opinion and Response to Censorship Allegations

Don, thank you. I look forward to reviewing the letter.

Sent from my iPhone

On Feb 23, 2018, at 4:46 PM, Don Wilson <DHW@BosDun.com> wrote:

> CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

From: Drew Crawford
Sent: Friday, February 23, 2018 4:07 PM
To: Angela Garcia Falconetti
Cc: Donald Painter; Peter Elliott; Tamara Sakagawa; Don Wilson
Subject: "Death of Innocence" // Proposed Legal Opinion and Response to Censorship Allegations

Dr. Falconetti:

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Very truly yours,
W.A. "Drew" Crawford

BOSWELL & DUNLAP LLP
ATTORNEYS AT LAW · EST. 1900

Boswell & Dunlap LLP | **Mailing:** Post Office Drawer 30, Bartow, Florida 33831-0030
Telephone: 863-533-7117 | **Facsimile:** 863-533-7412 | **Email:** drew@bosdun.com

TAX ADVICE DISCLOSURE: Pursuant to the requirements of Internal Revenue Service Circular 230, please be advised that any federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of: (1) avoiding penalties that may be imposed under the Internal Revenue Code or (2) promoting, marketing or recommending to another party any transaction or matter addressed in this communication.

Please consider the environment before printing this email.

<Ltr to A Garcia Falconetti (Draft)(02-23-2018).doc>

<Enclosures (Death of Innocence and Faculty Art Show Flyer).pdf>

<Cases Cited in Ltr to A Garcia Falconetti (02-23-2018).pdf>

From: Angela Garcia Falconetti
Sent: Thursday, February 22, 2018 4:49 PM
To: Donald Painter;Don Wilson;Peter Elliott;Tamara Sakagawa
Subject: FW: The Censorship of "Death of Innocence"

Dr. Angela M. Garcia Falconetti, CFRE
President
Polk State College
agarciafalconetti@polk.edu
(863) 297-1098, Office
(863) 297-1053, Fax

POLK STATE COLLEGE

We are Polk.

From: Christopher Finan [mailto:chris@ncac.org]
Sent: Thursday, February 22, 2018 4:00 PM
To: Frank Edler <frankhwedler@gmail.com>
Cc: Angela Garcia Falconetti <AGarciaFalconetti@polk.edu>; Sarah McLaughlin <sarah@thefire.org>; joan bertin <joanebertin@gmail.com>
Subject: Re: The Censorship of "Death of Innocence"

Thanks for sharing this with us, Frank. I particularly like your quoting the AAUP statement from their website!

Chris

On Thu, Feb 22, 2018 at 3:35 PM, Frank Edler <frankhwedler@gmail.com> wrote:

February 22, 2018

Dear President Falconetti,

I am a free speech advocate, and I am dismayed and saddened to learn that Polk State College decided to censor the artwork of Serhat Tanyolacar entitled "Death of Innocence."

Mr. Tanyolacar was informed on February 6 by Nancy Lozell that his work would not be displayed because the college "offers classes and volunteer opportunities to our collegiate charter high schools and other high schools in Polk county and we feel that that particular piece would be too controversial to display at this time."

As it happens, both reasons lack any merit. The first reason that high school students need to be protected when they come to or attend Polk State College by removing works of art that might offend younger sensibilities not only turns high school students into innocent little lambs who can't cope with a disturbing image, but it also denies all the adult members of your college the chance to experience the work. Why would you let the tail wag the dog? If you feel that strongly about protecting innocent high schoolers, then just deny them access to the exhibition, although this is not a solution I would recommend.

I'm assuming that Polk State College agrees with the AAUP policy paper entitled Academic Freedom and Electronic Communications since it is located at the College's website. The policy explicitly states that "Any policies designed to protect minors must, however, avoid denying materials to adults who have a valid claim of access—a point that every federal court facing this issue has stressed in the course of striking down at least eight state 'harmful to minors on the Internet' laws in recent years."

The second reason given for censoring Mr. Tanyolacar's artwork is that it is "too controversial." Works of art, especially those that make political statements, have nearly always been controversial. Marcel Duchamp's Mona Lisa with a mustache shocked people; Igor Stravinsky's Rite of Spring caused a riot in Paris. Believe me when I say that "Death of Innocence" may shock some people, but it will not cause a riot. The purpose of shock is to get people to think in new and different ways. Controversy should be at the heart of higher education. As Jean Piaget once said, "Education means making creators... You have to make inventors, innovators, not conformists."

Please reconsider the decision to censor Mr. Tanyolacar's artwork.

Sincerely,

Frank Edler, Ph. D.

--

Christopher Finan, Executive Director
National Coalition Against Censorship (NCAC)
19 Fulton St., Suite 407
New York, NY 10038
(212) 807-6242 (office)
(917) 509-0340 (cell)

The National Coalition Against Censorship promotes freedom of thought, inquiry and expression, and opposes all forms of censorship.

From: Angela Garcia Falconetti
Sent: Monday, February 19, 2018 11:26 AM
To: Donald Painter;Stephen Hull
Cc: Yvonne Velez;Christine Lee;Gina Wysock;Jill Hall
Subject: FW: With Gratitude

FYI

Dr. Angela M. Garcia Falconetti, CFRE
President
Polk State College
agarciafalconetti@polk.edu
(863) 297-1098, Office
(863) 297-1053, Fax

POLK STATE COLLEGE

We are Polk.

From: Angela Garcia Falconetti
Sent: Monday, February 19, 2018 11:26 AM
To: 'Serhat Tanyolacar' <serhat@mail.usf.edu>
Subject: RE: With Gratitude

Thank you for your e-mail. I will expect your message within the next two days as you noted in your e-mail below.

Best regards,
Angela

Dr. Angela M. Garcia Falconetti, CFRE
President
Polk State College
agarciafalconetti@polk.edu
(863) 297-1098, Office
(863) 297-1053, Fax

POLK STATE COLLEGE

We are Polk.

From: Serhat Tanyolacar [mailto:serhat@mail.usf.edu]
Sent: Monday, February 19, 2018 9:24 AM
To: Angela Garcia Falconetti <AGarciaFalconetti@polk.edu>
Cc: Serhat Tanyolacar <serhat@mail.usf.edu>
Subject: With Gratitude

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Dr. Falconetti,

It was honor to be in your presence during the last Friday's meeting. I am grateful to see that Polk State College has a president who appreciates the hard work of the dedicated faculty.

I highly value all the time and effort that you put forth to find a common-ground for all of us. Within the next 2 days please expect an in-depth email which will be clearly reflecting my objective analysis over our meeting.

I believe that the meeting aroused more questions than it answered, and I must clearly address these issues in order to reflect my vision in academia.

Respectfully Yours,

Serhat Tanyolacar
813-846-2692
www.serhattanyolacar.com
www.youtube.com/serhattanyolacar

From: Angela Garcia Falconetti
Sent: Monday, February 19, 2018 11:26 AM
To: Serhat Tanyolacar
Subject: RE: With Gratitude

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Best regards,
Angela

Dr. Angela M. Garcia Falconetti, CFRE
President
Polk State College
agarciafalconetti@polk.edu
(863) 297-1098, Office
(863) 297-1053, Fax

POLK STATE COLLEGE

We are Polk.™

From: Serhat Tanyolacar [mailto:serhat@mail.usf.edu]
Sent: Monday, February 19, 2018 9:24 AM
To: Angela Garcia Falconetti <AGarciaFalconetti@polk.edu>
Cc: Serhat Tanyolacar <serhat@mail.usf.edu>
Subject: With Gratitude

Dr. Falconetti,

It was honor to be in your presence during the last Friday's meeting. I am grateful to see that Polk State College has a president who appreciates the hard work of the dedicated faculty.

I highly value all the time and effort that you put forth to find a common-ground for all of us. Within the next 2 days please expect an in-depth email which will be clearly reflecting my objective analysis over our meeting.

I believe that the meeting aroused more questions than it answered, and I must clearly address these issues in order to reflect my vision in academia.

Respectfully Yours,

Serhat Tanyolacar
813-846-2692
www.serhattanyolacar.com
www.youtube.com/serhattanyolacar

From: Angela Garcia Falconetti
Sent: Thursday, February 15, 2018 12:55 PM
To: Pumariega, Madeline
Subject: FW: Letter from FIRE and NCAC
Attachments: FIRE Letter to Polk State College, February 2018-2.pdf

Chancellor,

I send the below and attached in preparation for our 1pm conference call.

Angela

Dr. Angela M. Garcia Falconetti, CFRE
President
Polk State College
agarciafalconetti@polk.edu
(863) 297-1098, Office
(863) 297-1053, Fax

POLK STATE COLLEGE

We are Polk.

From: Sarah McLaughlin [mailto:sarah@thefire.org]
Sent: Wednesday, February 14, 2018 4:03 PM
To: Angela Garcia Falconetti <AGarciaFalconetti@polk.edu>
Cc: Christopher Finan <chris@ncac.org>; Nancy Lozell <NLozell@polk.edu>
Subject: Letter from FIRE and NCAC

Dear President Falconetti:

Attached to this email please find today's letter from the Foundation for Individual Rights in Education (FIRE) and the National Coalition Against Censorship (NCAC) regarding Polk State College's rejection of a faculty member's contribution to an art exhibit because it was "too controversial."

Because of the urgency of this matter, we request a response to this letter no later than February 16, 2018.

Best,

--

Sarah McLaughlin
Senior Program Officer, Individual Rights Defense Program and Social Media Manager
Foundation for Individual Rights in Education (FIRE)
510 Walnut Street
Suite 1250
Philadelphia, PA 19106
Ph: 215-717-3473 Fax: 215-717-3440
sarah@thefire.org
@sarahemclaugh

FIRE
Foundation for Individual Rights in Education

February 14, 2018

President Angela Garcia Falconetti
Office of the President, WAD-216
Polk State College
3425 Winter Lake Road
Lakeland, Florida 33803

URGENT

Sent via U.S. Mail and Electronic Mail (agarciafalconetti@polk.edu)

Dear President Falconetti:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses. The National Coalition Against Censorship (NCAC), founded in 1974, is an alliance of over 50 national nonprofit organizations, including literary, artistic, religious, educational, professional, labor, and civil liberties groups dedicated to promoting the right to free speech.

FIRE is concerned about the state of freedom of expression at Polk State College following the college's rejection of a faculty member's contribution to an art exhibit because it was "too controversial."

I. FACTS

The following is our understanding of the facts; please inform us if you believe we are in error.

On January 3, Professor Holly Scoggins emailed all Visual Arts faculty members to ask that they submit artwork for a faculty exhibition beginning February 12:

> This is a notice that we will be having a Faculty exhibition on the Lakeland Campus during February and March.
> We are asking everyone to submit between 1-5 pieces (depending on the size) for the exhibition.
>
> **The artwork should arrive to the Lakeland Gallery no later than FEBRUARY 8TH**

> If you are doing an installation, you may install between February 5^{Th}-9^{th}.
> Please let me know the dimensions of the installation ahead of time.
> Submit an inventory list to Nancy Lozell nlozell@Polk.edu, no later than February 8^{th} Inventory list should include: Title, Artist name, Materials, Price if for sale, Insurance value (even if it is NFS), dimensions, and your contact info.

Part-time faculty member Serhat Tanyolacar submitted a piece titled "Death of Innocence," which includes images of several poets and writers, including T.S. Eliot and his wife Vivienne Haigh-Wood Eliot, Pablo Neruda and his wife Matilde Urrutia, Woody Guthrie, Jack Kerouac, and Elizabeth Bishop, whose main subjects are love, consciousness, freedom and justice. As juxtaposition, the piece also depicts a number of graphic iterations of President Donald Trump and other political figures engaging in sexual activity. According to Tanyolacar, the artwork is intended to highlight "moral corruption and moral dichotomy" and provoke dialogue.

On February 6, Program Coordinator Nancy Lozell informed Tanyolacar that his artwork would not be shown in the faculty art exhibit because it was "too controversial." Lozell wrote:

> Thank you for your interest in displaying your artwork in the Polk State College Faculty Art Show. After review by the gallery committee and the gallery administrator it was agreed upon that your piece Death of Innocence should not be displayed in the Faculty Art Show. Polk State College offers classes and volunteer opportunities to our collegiate charter high schools and other high schools in Polk county and we feel that that particular piece would be too controversial to display at this time. We would be very happy for you to display some of your other artworks.

Tanyolacar asked for further explanation about the gallery committee's decision not to display his artwork. On February 9, Lozell replied, in part:

> I apologize for the delay in responding. We very much appreciate your passion for your work and your desire to exhibit in our Faculty Art Show. As mentioned in my e-mail below, the gallery committee, which is comprised primarily of full-time art faculty, has declined to include it in the show.
>
> I hope you understand that this is a limited exhibit sponsored and presented by Polk State College, and we have an established process for reviewing and selecting the art to be exhibited. Submissions or proposed exhibits are reviewed by the gallery committee, and they make a decision about what pieces to include in a show. Their decision is based on a number of criteria, which include, without intending to set out a complete list of such criteria, the theme of the show, the appropriateness of the piece, the number of pieces that can be displayed based on available space, and the size of individual works.

II. ANALYSIS

Polk State's rejection of Tanyolacar's artwork for being "too controversial to display at this time" is contrary to the college's moral and legal obligation to protect and honor the freedom of expression of its faculty.

The primacy of the First Amendment at public colleges like Polk State is well established. *See Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) ("With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities."); *Healy v. James*, 408 U.S. 169, 180 (1972) ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'") (internal citation omitted). This precedent should serve as a lodestar for public colleges and universities navigating art controversies.

i. Tanyolacar's artwork should not be barred simply because it has the potential to cause offense

As a preliminary matter, the Supreme Court has repeatedly cautioned against limiting expression like Tanyolacar's on the basis that those who witness it may be offended. *See Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) ("[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.").

These holdings are applicable in assessing restrictions on expression imposed by public institutions like Polk State. In *Papish v. Board of Curators of the University of Missouri,* a case involving the speech rights of a public university student expelled for distributing a newspaper containing a cartoon depiction of the Statue of Liberty and Goddess of Justice being sexually assaulted by police officers, the Supreme Court held that speech "on a state university campus may not be shut off in the name alone of 'conventions of decency.'" 410 U.S. 667, 670 (1973). Tanyolacar's artwork enjoys similar protection.

ii. Polk State cannot treat members of the campus community as if they are children

To the extent that Polk State believes it *must* limit expression on the basis that minors might encounter it, it is misguided. Courts have consistently held that college students are not minors, and that debate on campuses cannot be sanitized as if they are. *See Healy*, 408 U.S. at

197 (Douglas, J., concurring) ("[s]tudents—who, by reason of the Twenty-sixth Amendment, become eligible to vote when 18 years of age—are adults who are members of the college or university community"); *see also Kincaid v. Gibson*, 236 F.3d 342, 346 (6th Cir. 2001) (holding that the Supreme Court's decision in *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988), did not apply to the college setting because college students are "young adults"); *Bradshaw v. Rawlings*, 612 F.2d 135, 139 (3d Cir. 1979) ("[c]ollege students today are no longer minors; they are now regarded as adults in almost every phase of community life"). Furthermore, while the Supreme Court has—in certain limited circumstances—permitted government actors to impose narrowly targeted content-based restrictions in the interest of preventing children from viewing indecent or patently offensive sexual programming, that interest does not extend to a "free-floating power to restrict the ideas to which children may be exposed." *Brown v. Entm't Merchs. Ass'n,* 564 U.S. 786, 794 (2011). Specifically, the Court has held that "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Erznoznik v. Jacksonville,* 422 U.S. 205, 213–14 (1975). "[T]he government may not 'reduce the adult population . . . to reading only what is fit for children.'" *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73–74 (1983) (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)). On a public college campus, adults sharing views with one another cannot constitutionally be required to childproof their expression, including artistic or scholarly expression, simply because a passing teenager might happen upon it.

iii. Polk State underestimates high school students' ability to cope with controversial art

In addition to the harm Polk State inflicts upon Tanyolacar by disallowing the exhibition of his artwork, the college does a disservice to the young people it seeks to engage by attempting to sanitize the world around them.

In a 1973 letter to Charles McCarthy, head of the school board at North Dakota's Drake High School who had demanded that 32 copies of Kurt Vonnegut's novel *Slaughterhouse-Five* be burned in the school's furnace because of "obscene" content, Vonnegut implored McCarthy to rethink his decision. Vonnegut wrote, in part:[1]

> If you were to bother to read my books, to behave as educated persons would, you would learn that they are not sexy, and do not argue in favor of wildness of any kind. They beg that people be kinder and more responsible than they often are. It is true that some of the characters speak coarsely. That is because people speak coarsely in real life. Especially soldiers and hardworking men speak coarsely, and even our most sheltered children know that. And we all know, too, that those words really don't damage children much. They didn't damage us

[1] Letter from Kurt Vonnegut to Charles McCarthy, Head of School Board, Drake High School (Nov. 16, 1973), *available at* http://www.lettersofnote.com/2012/03/i-am-very-real.html.

> when we were young. It was evil deeds and lying that hurt us.
>
> After I have said all this, I am sure you are still ready to respond, in effect, "Yes, yes—but it still remains our right and our responsibility to decide what books our children are going to be made to read in our community." This is surely so. But it is also true that if you exercise that right and fulfill that responsibility in an ignorant, harsh, un-American manner, then people are entitled to call you bad citizens and fools. Even your own children are entitled to call you that.
>
> [. . .]
>
> If you are an American, you must allow all ideas to circulate freely in your community, not merely your own.
>
> If you and your board are now determined to show that you in fact have wisdom and maturity when you exercise your powers over the education of your young, then you should acknowledge that it was a rotten lesson you taught young people in a free society when you denounced and then burned books—books you hadn't even read. You should also resolve to expose your children to all sorts of opinions and information, in order that they will be better equipped to make decisions and to survive.

Polk State has not burned books. But it has nonetheless made the same mistake that Charles McCarthy did. Polk assumes that high school students—who may not even come across Tanyolacar's artwork in the first place—will be unable to understand or cope with the controversial ideas contained within it.

The opposite is true. For many students, the most groundbreaking moments of education are the ones in which their beliefs, thoughts, or feelings are fundamentally challenged, an act that often involves literature or artwork that is controversial, subversive, or unnerving. Refusing to display controversial art on the basis that young people might encounter it not only limits what adults might view, but does so on an unfounded basis: that controversial educational material serves no purpose.

The world in which high schoolers live is not childproofed, and their education should not be either.

One can hardly forget that for months, a 2005 tape of now-President Donald Trump was played regularly by news stations and was a major topic of national discussion in the weeks leading up to the 2016 election. On that tape, Trump can be heard making a number of sexually-charged comments about women, including "I moved on her like a bitch, but I couldn't get there, and she was married. Then all of a sudden I see her, she's now got the big phony tits and everything," and "I just start kissing them. It's like a magnet. Just kiss. I don't

even wait. And when you're a star they let you do it. You can do anything . . . Grab them by the pussy. You can do anything."[2] For twenty years, former president Bill Clinton's sexual relationship with White House intern Monica Lewinsky has been a common topic of conversation in American politics. Since January, news stations have discussed the possibility that Trump paid a large sum to adult film star Stormy Daniels in 2016 so that she would not publicly discuss their alleged 2006 affair.[3]

Polk State will be hard-pressed to explain why high school students seeing the phrase "grab them by the pussy" plastered on the news for months will be incapable of encountering artwork intended to criticize perceived moral depravity in American politics. Polk State cannot shield high school students from encountering stories which, due to their sexual nature, undoubtedly lead to uncomfortable conversations. But a college should not attempt to shield students from artwork that seeks to offer commentary on or criticism of these stories, however uncomfortable its viewers may be.

III. CONCLUSION

Polk State College's decision to reject "Death of Innocence," undertaken with the stated purpose of shielding high school students from "controversial" artwork, is unbecoming of an institution of higher education. The college must reverse its illiberal decision and reassess Tanyolacar's submitted artwork in a viewpoint-neutral manner.

NCAC has vast experience with art controversies and will be pleased to advise Polk State College further in handling controversies in a productive manner, which respects both academic freedom and First Amendment principles.

Because the faculty art show at which Tanyolacar intends to display his work began on February 12, we request a response to this letter no later than February 16, 2018.

Sincerely,

Sarah McLaughlin

Sarah McLaughlin
Senior Program Officer, Individual Rights Defense Program, FIRE

---

[2] *Trump Was Recorded in 2005 Bragging About Grabbing Women "by the Pussy,"* Ben Mathis-Lilley, SLATE (Oct. 7, 2016),
http://www.slate.com/blogs/the_slatest/2016/10/07/donald_trump_2005_tape_i_grab_women_by_the_pussy.html.

[3] *Stormy Daniels: Donald Trump's alleged porn star affair and hush money scandal explained,* Dylan Matthews, VOX (Jan 30. 2018), https://www.vox.com/policy-and-politics/2018/1/17/16901602/trump-stormy-daniels-hush-money-scandal-porn.

Christopher Finan
Executive Director, National Coalition Against Censorship

cc:
Nancy Lozell, Program Coordinator

From: Don Wilson <DHW@BosDun.com>
Sent: Friday, February 23, 2018 4:45 PM
To: Angela Garcia Falconetti
Cc: Drew Crawford
Subject: FW: "Death of Innocence" // Proposed Legal Opinion and Response to Censorship Allegations
Attachments: Ltr to A Garcia Falconetti (Draft)(02-23-2018).doc; Enclosures (Death of Innocence and Faculty Art Show Flyer).pdf; Cases Cited in Ltr to A Garcia Falconetti (02-23-2018).pdf

From: Drew Crawford
Sent: Friday, February 23, 2018 4:07 PM
To: Angela Garcia Falconetti
Cc: Donald Painter; Peter Elliott; Tamara Sakagawa; Don Wilson
Subject: "Death of Innocence" // Proposed Legal Opinion and Response to Censorship Allegations

Dr. Falconetti:

Good afternoon! As requested, enclosed please find a draft letter to you regarding the "Death of Innocence" matter for your use and review. We have left the letter in draft form so as to tailor it appropriately to any audience that you feel is a necessary or required recipient.

I have included for you the suggested enclosure (a copy of Death of Innocence and the Faculty Art Show flyer) and a copy of the text of the cases we relied on in making our opinion. As you will see after your review, this type of dispute has happened in the past and we feel that we have a good legal ground to stand on if we should ever be required to make our case.

We are certainly open to finalizing the letter, signing it and sending you a formal copy if you think that is the appropriate next step.

If we can be of any further assistance to you on this matter, please let us know.

Very truly yours,
W.A. "Drew" Crawford

BOSWELL & DUNLAP LLP
ATTORNEYS AT LAW • EST. 1900

Boswell & Dunlap LLP | **Mailing:** Post Office Drawer 30, Bartow, Florida 33831-0030
Telephone: 863-533-7117 | **Facsimile:** 863-533-7412 | **Email:** drew@bosdun.com

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February 23, 2018

Via Electronic Mail and United States Mail

Dr. Angela M. Garcia Falconetti
President
Polk State College
999 Avenue H NW
Winter Haven, Florida 33880
Email: agarciafalconetti@polk.edu

RE: **Request for Legal Opinion**
Faculty Art Show & "Death of Innocence"

Dear President Garcia Falconetti:

You have requested our legal opinion regarding Polk State College's determination to reject the artwork entitled "Death of Innocence" (the "Work") from inclusion and display as part of the College's "Faculty Art Show" exhibit (the "Art Exhibit"). In brief sum, after consideration of the facts surrounding the College's determination, a brief review of the Work, review of pertinent cases and decisions, and discussions with local law enforcement officials, it is our opinion that Polk State College is not required by the First and Fourteenth Amendments to the United States Constitution to include the Work in its Art Exhibit. Further, applying local community standards, the Work appears to be obscene and, as such, likely does not enjoy any First Amendment protection.

Facts

We understand that on or about January 3, 2018, Art Professor Holly Scoggins emailed all full, part-time and adjunct faculty members of the College's Visual Arts Department with a reminder notice that the College intended to have "a Faculty exhibition on the Lakeland Campus during February and March." All faculty members were asked to "submit between 1-5 pieces (depending on the size) for the exhibition." This event, dubbed the "Faculty Art Show," is one of several exhibitions that is displayed annually in the College's "Fine Arts Gallery," a small dedicated gallery space (not greater than 300 square feet) situated near the main entrance of the College's Lakeland Technology Building ("LTB"). According to media published by the College, the Art Exhibit is scheduled to run at the LTB gallery

from February 12, 2018 through March 16, 2018. Like all exhibitions held in the Gallery, the Art Exhibit is open for student, faculty and public viewing Monday through Thursday from 10:00 A.M. to 2:00 P.M. The College does not charge admission, check identification or prevent members of the public of any age from entering the gallery and viewing its chosen displays.

Each work, exhibit and show displayed in the LTB gallery is selected by the College's gallery committee. We understand that the gallery committee consists of the gallery administrator and the three full-time Professors of Art employed by the College. The gallery committee is granted broad discretion by the College to choose what artworks and exhibits to display in the LTB gallery throughout the year. Exhibits for the gallery are generally planned far in advance of the date of display.

In response to Professor Scoggins' January 3 solicitation, Adjunct Professor Serhat Tanyolacar submitted the Work to the gallery committee for evaluation and potential inclusion in the Art Exhibit. The Work, a photographic copy of which is enclosed with this letter, is a large suite of laser-engraved prints (measuring roughly 48" in height and 96" in length) that depicts, according to the artist's representatives, "images of several poets and writers, including T.S. Eliot and his wife Vivienne Haigh-Wood Eliot, Pablo Neruda and his wife Matilde Urrutia, Woody Guthrie, Jack Kerouac, and Elizabeth Bishop." Further, "[a]s juxtaposition," the Work depicts "a number of graphic iterations of President Donald Trump and other political figures engaging in sexual activity." The bulk of the Work appears to consist of the latter. Almost three-quarters of the Work features dozens of nude figures, both male and female, engaging in intercourse and fellatio in an orgy-like environment. Per the artist, the Work "is intended to highlight moral corruption and moral dichotomy."

On February 6, 2018, gallery administrator Nancy Lozell wrote the artist and stated that "After review by the gallery committee and the gallery administrator it was agreed ... that your piece ... should not be displayed in the Faculty Art Show." Lozell stated that "Polk State College offers classes and volunteer opportunities to ... collegiate charter high schools and other high schools in Polk county and" that the gallery committee decided that the artist's "piece would be too controversial to display at this time." When pressed by the artist for more information, Lozell explained in an email dated February 9 that the Art Exhibit "is a limited exhibit sponsored and presented by Polk State College." Lozell articulated that the College has:

> "an established process for reviewing and selecting the art to be exhibited. Submissions or proposed exhibits are reviewed by the gallery committee, and they make a decision about what pieces to include in a show. Their decision is based on a number of criteria, which include, without intending to set out a complete list of such criteria, the theme of the show, the appropriateness of the piece, the number of pieces that can be displayed based on available space, and the size of individual works."

The instant controversy ensued. Adjunct Tanyolacar and his representatives argue that the College has violated his First Amendment rights by refusing to include the Work in the Art Exhibit. Additionally, various higher education advocacy and special interest groups have written the College and requested it to display the Work, despite the conclusions of its gallery committee and gallery administrator.

The College Is Not Required To Display The Work In The LTB Gallery

Generally, the First Amendment does not restrict or apply to the expressive conduct of a government entity. *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009). A public organization, like the College, is by law "entitled to say what it wishes" – *Id.* (*citing Rosenburger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) – "and to select the views that it wants to express." *Id.* (*citing Rust v. Sullivan*, 500 U.S. 173, 194 (1991); *Accord Newton v. LePage*, 789 F. Supp. 2d 172, 193 (D. Maine 2011)("the overwhelming weight of authority indicates that government speech may say what it wishes regardless of viewpoint").

For example, in the case of *Piarowski v. Illinois Community College District 515*, the United States Court of Appeals for the Seventh Circuit held that community college administrators could require an art professor to remove sexually explicit artwork from a public college corridor without violating the First Amendment. 759 F.2d 625 (7th Cir. 1985). In *Piarowski*, an art professor contributed stained glass windows to a community college's annual "Art Department Faculty Exhibition." *Id.* at 627. As described by the Court, the controversial works consisted of three windows:

> One depicts the naked rump of a brown woman, and sticking out from (or into) it a white cylinder that resembles a finger but on careful inspection is seen to be a jet of gas. Another window shows a brown woman from the back, standing, naked except for stockings, and apparently masturbating. In the third window another brown woman, also naked except for stockings and also seen from the rear, is crouching in a posture of veneration before a robed white male whose most prominent feature is a grotesquely outsized phallus (erect penis) that the woman is embracing.

Id. While the *Piarowski* Court narrowly holds that a college does "not infringe on the First Amendment rights" of its faculty member "merely by ordering him to move ... art to another room in the same building," – *Id.* at 632-33 – the Court notes in its opinion that "The first-floor gallery in [the] College's main building is a place of great prominence and visibility, implying college approval rather than just custody, and the offending windows could be seen by people not actually in the gallery." *Id.* at 630. "There is no constitutional right to exhibit sexually graphic works of art in a gallery that is missing an outside wall." *Id.*

In the case of *Serra v. United States General Services Administration*, the United States Court of Appeals for the Second Circuit determined that the "state may regulate the display and location of art based on its aesthetic qualities and suitability for the viewing public without running afoul of First Amendment concerns." 847 F.2d 1045, 1051 (2d Cir. 1988)(*citing Piarowski, supra* at 630-32). In *Serra*, the GSA relocated a site-specific steel sculpture from a prominent location in New York City's federal plaza to a separate government venue. Ruling for the government, the Court stated that "the First Amendment has only limited application in a case ... where the artistic expression belongs to the Government rather than a private individual." *Id.* at 1048. "[T]he Government's important interest in controlling federal property has been found to prevail over individuals' First Amendment rights" in virtually all contexts. *Id.* at 1049.

More to the point, in the case of *Claudio v. United States*, the United States District Court for the

Eastern District of North Carolina held that GSA administrators were entitled to the benefit of qualified immunity after they revoked a government permit originally authorizing the display of a "gory and graphic painting entitled 'Sex, Laws & Coathangers' in the main entrance lobby of the Raleigh, North Carolina federal building." 836 F. Supp. 1219, 1230 (E.D.N.C. 1993). In *Claudio*, the District Court applied a public forum analysis and ruled "the main entrance lobby of the Raleigh, North Carolina, federal building/post office/courthouse is a non-public forum, which has been dedicated to use for either communicative or non-communicative purposes but has never been designated for indiscriminate expressive activity by the general public." *Id.* at 1225. *See Piarowski*, *supra* at 629 (combining the facts that "the public was not allowed to exhibit in the art gallery" with only "[o]ccasional use by outsiders," the college art gallery is not a "public forum").

Importantly, and similar to the issue currently faced by the College, the *Claudio* art permit was revoked because the art was considered to be "political" and "controversial." *Id.* at 1222. The *Claudio* painting is described by the Court as "depicting a nude woman, a three dimensional portrayal of a human fetus and a wire coathanger whose bent end appears to be dripping blood." *Id.* at 1226. In the GSA's written revocation notice to the artist, the GSA stated "although your display may be in the form of art it is more properly described as a political expression concerning the highly controversial issue of abortion." *Id.* at 1222. "Since your work is considered to be political in nature it is not permitted on federal property and your license is hereby revoked." *Id.*

Here, like the foregoing cases, the Work under consideration is sexually graphic, disturbing and determined by College administrators to be inappropriate for public display. The College's art gallery, a nonpublic forum managed by College professors in their official capacity as College employees, is used by the College to provide the public with *the College's* speech of what it believes to be appropriate expressions of art. The College is not required, as a matter of First Amendment law, to present controversial pieces of art for public consumption in its nonpublic forum, especially if the place in question "impl[ies] college approval rather than just custody." *Piarowski* at 630.

Further, the reason provided to the artist of the Work – that the piece is too controversial – is a satisfactory reason under the First Amendment. *Claudio* at 1222. While the College certainly has other viewpoint neutral reasons for rejecting the display (size being chief among them), avoiding controversy and the oft-following potential for disruption in public services or damage to public property does not appear to be an improper or illicit motive. *Id.* at 1229.

<u>*The Work Appears To Be Obscene*</u>

Sexually explicit material that violates fundamental notions of decency is not protected by the First Amendment. *United States v. Williams*, 553 U.S. 285, 288 (2008). To determine whether a particular work of art is obscene, the court system asks: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *See Miller v. California*, 413 U.S. 15, 24 (1973).

Florida law criminalizes the display of obscene material. *See* § 847.011(1)(a), Fla. Stat. (2017).

Earlier this week, we understand that you and several other College administrators met with the Polk County Sheriff and an Assistant State Attorney for the Tenth Judicial Circuit to discuss the Work. We understand that both the Sheriff and the Assistant State Attorney have stated that they view the Work to be obscene material and that they intend to enforce Florida's obscenity statute in the event that the Work is displayed to the general public without restriction.

Without question, the Work is an overt depiction of sex acts being committed by national politicians, including the President of the United States. Art is often in the eye of the beholder, but, as Justice Potter is known for saying, "I know [obscene material] when I see it." *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964)(Potter, J., concurring). You are certainly entitled to rely upon the wisdom and advice of the County Sheriff and the State Attorney's Office in determining if the local Polk County community would view the Work as obscene material. Given that law enforcement has opined that the Work is obscene, we feel constrained to advise you of the same.

Based on the foregoing, Polk State College is not required to display "Death of Innocence" – or any other work of art for that matter – in its LTB Fine Arts Gallery. A government's decision to display or not display a particular piece of art in a nonpublic forum is not subject to the First Amendment. Further, given the overtly sexual nature of the Work in question, and the advice the College has received from local law enforcement officials, there appears to be reason to believe that the Work is an obscenity and, as such, the Work does not in and of itself appear to be entitled to First Amendment protection.

Please advise if you have any questions or if we may be of any further service to you regarding this matter.

Very truly yours,
BOSWELL & DUNLAP LLP

DRAFT

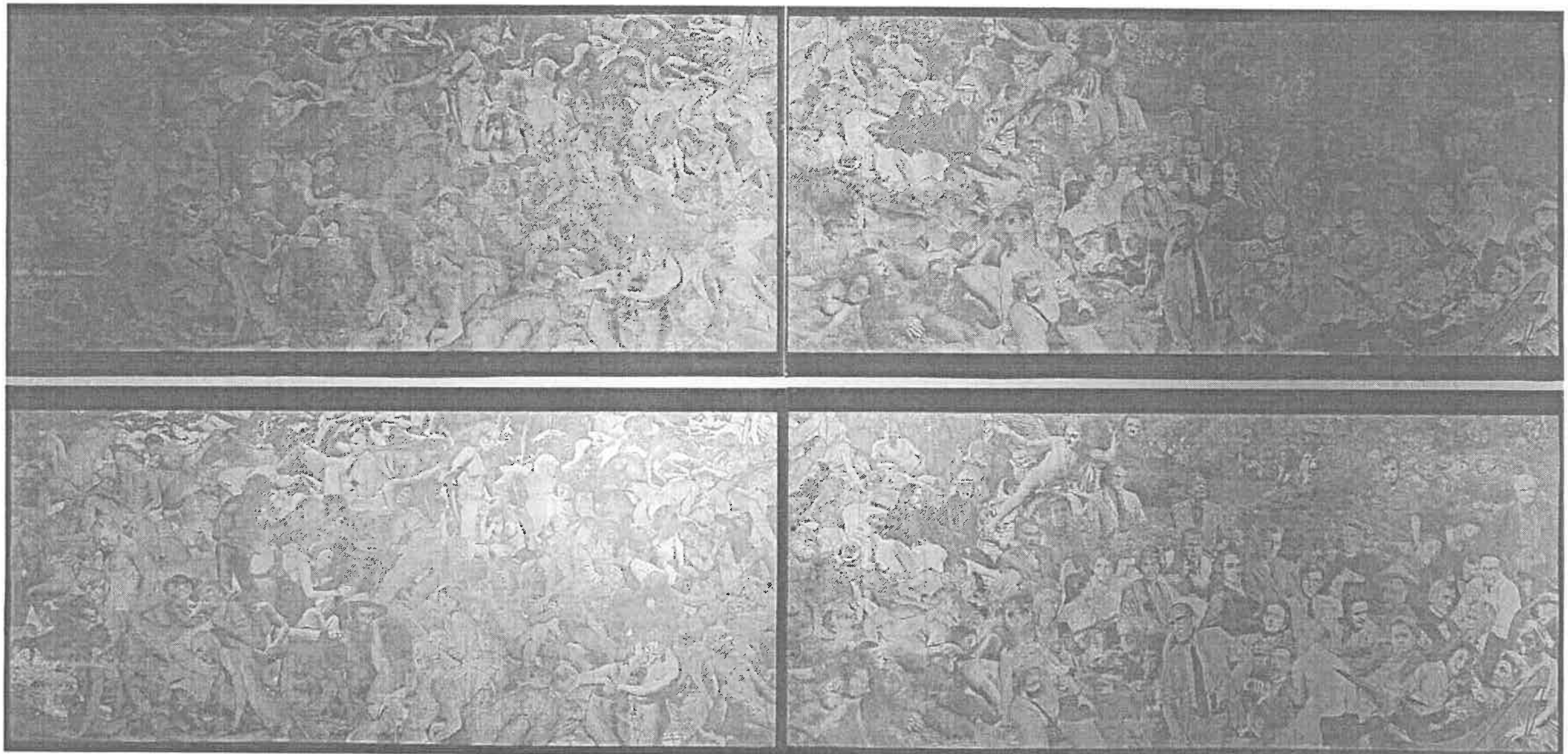
W.A. "Drew" Crawford

Enclosure

CC: Donald Painter
Peter Elliott
Tamara Sakagawa
Donald H. Wilson, Jr.

1.

3.



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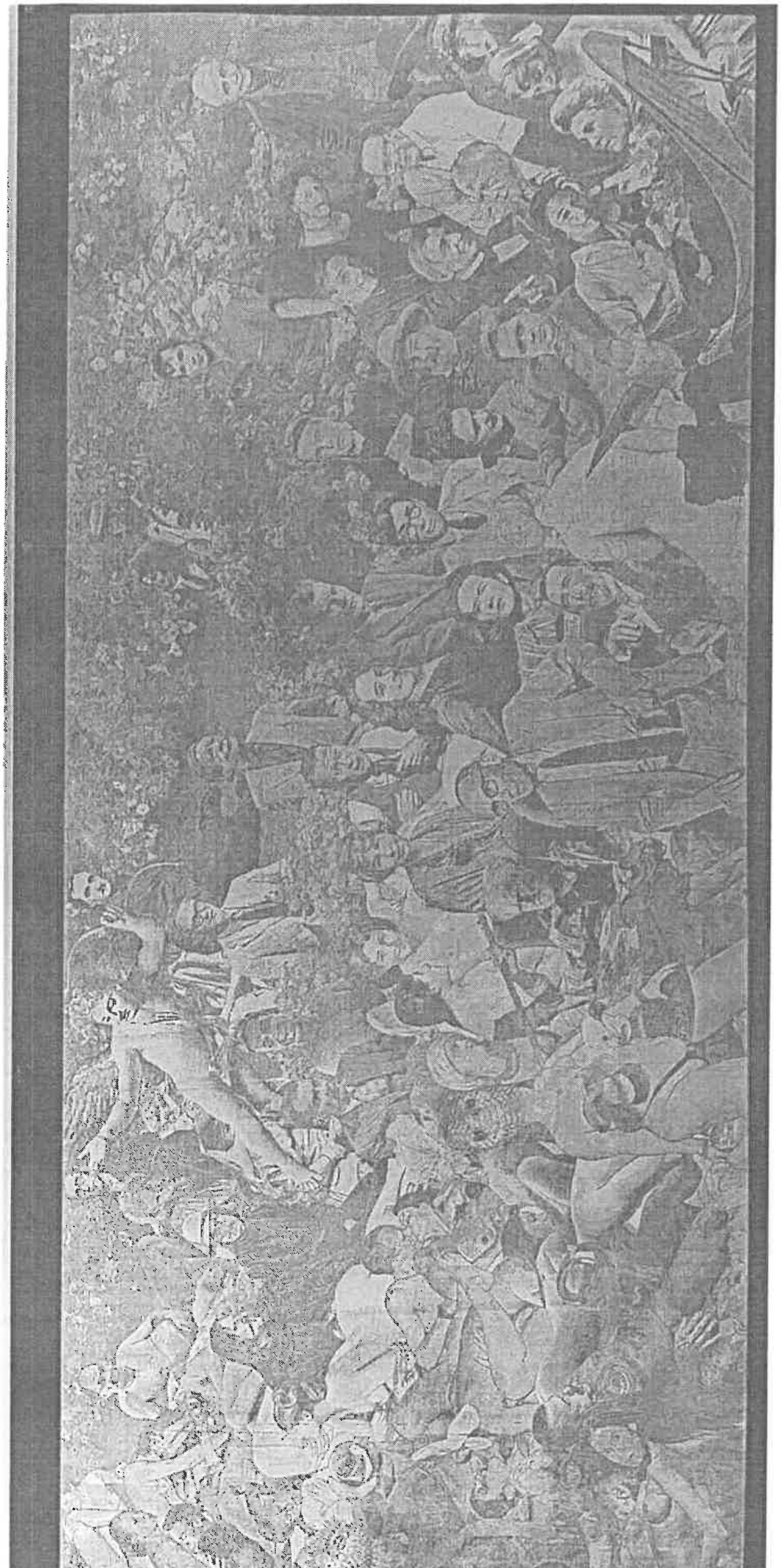

4

Polk State presents...™

FACULTY ART SHOW

LAKELAND GALLERY EXHIBITION

FEBRUARY 12-MARCH 16

MONDAY-THURSDAY | 10:00 A.M.-2:00 P.M.

RECEPTION: MARCH 1 | 5:00 P.M.-7:00 P.M.

Polk State Lakeland
Fine Arts Gallery
3425 Winter Lake Road
Lakeland, FL 33803

POLK STATE
The Arts

Artwork by Kristina Stafford

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Matal v. Tam, U.S., June 19, 2017

129 S.Ct. 1125
Supreme Court of the United States

PLEASANT GROVE CITY, UTAH, et al., Petitioners,
v.
SUMMUM.

No. 07–665.
|
Argued Nov. 12, 2008.
|
Decided Feb. 25, 2009.

Synopsis
Background: Religious organization brought § 1983 action alleging that its free speech rights were violated by city's denial of its request to erect monument in park in which a Ten Commandments monument already stood. The United States District Court for the District of Utah, Dee Benson, J., 2006 WL 3421838, denied organization's request for preliminary injunction, and organization appealed. The United States Court of Appeals for the Tenth Circuit, 483 F.3d 1044, Tacha, Chief Circuit Judge, reversed, and certiorari was granted.

[Holding:] The Supreme Court, Justice Alito, held that by allowing placement of donated permanent monuments in public park, city was exercising a form of government speech not subject to scrutiny under Free Speech Clause.

Reversed.

Justice Stevens filed concurring opinion, in which Justice Ginsburg joined.

Justice Scalia filed concurring opinion, in which Justice Thomas joined.

Justice Breyer filed concurring opinion.

Justice Souter filed opinion concurring in the judgment.

West Headnotes (13)

[1] **Constitutional Law**
Freedom of Speech, Expression, and Press
Constitutional Law
Government-sponsored speech

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1490 In general
92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1563 Government-sponsored speech

The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. U.S.C.A. Const.Amend. 1.

108 Cases that cite this headnote

[2] **Constitutional Law**
Government-sponsored speech

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1563 Government-sponsored speech

Under the First Amendment's Free Speech Clause, a government entity has the right to speak for itself, and is entitled to say what it wishes and to select the views that it wants to express. U.S.C.A. Const.Amend. 1.

32 Cases that cite this headnote

[3] **Constitutional Law**
Government-sponsored speech

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1563 Government-sponsored speech

Under the First Amendment's Free Speech Clause, a government entity may exercise its freedom to express its views even if it receives assistance from private sources for the purpose of delivering a government-controlled message. U.S.C.A. Const.Amend. 1.

19 Cases that cite this headnote

[4] **Constitutional Law**
Establishment of Religion

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(A) In General
92k1294 Establishment of Religion
92k1295 In general

Government speech must comport with the Establishment Clause of the First Amendment. U.S.C.A. Const.Amend. 1.

57 Cases that cite this headnote

[5] **Constitutional Law**
Streets and highways
Constitutional Law
Parks and forests

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1759 Streets and highways
92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1761 Parks and forests

Under the First Amendment, members of the public retain strong free speech rights when they venture into public streets and parks. U.S.C.A. Const.Amend. 1.

11 Cases that cite this headnote

[6] **Constitutional Law**
Streets and highways
Constitutional Law
Parks and forests

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1759 Streets and highways
92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1761 Parks and forests

In order to preserve the public's free speech rights, under the First Amendment government entities are strictly limited in their ability to regulate private speech in such traditional public fora as public streets and parks. U.S.C.A. Const.Amend. 1.

41 Cases that cite this headnote

[7] **Constitutional Law**
Justification for exclusion or limitation

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1732 Public Forum in General
92k1735 Justification for exclusion or limitation

The First Amendment allows reasonable time, place, and manner restrictions on speech in public fora, but any restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest, and restrictions based

on viewpoint are prohibited. U.S.C.A. Const.Amend. 1.

72 Cases that cite this headnote

[8] **Constitutional Law**
Nature and requisites

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1744 Designated Public Forum in General
92k1746 Nature and requisites

Under the First Amendment, a government entity may create a designated public forum if government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose. U.S.C.A. Const.Amend. 1.

80 Cases that cite this headnote

[9] **Constitutional Law**
Justification for exclusion or limitation

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1744 Designated Public Forum in General
92k1747 Justification for exclusion or limitation

Under the First Amendment, government restrictions on speech in a designated public forum are subject to the same strict scrutiny as restrictions in a traditional public forum. U.S.C.A. Const.Amend. 1.

89 Cases that cite this headnote

[10] **Constitutional Law**
Limited Public Forum in General

Constitutional Law
Justification for exclusion or limitation

Constitutional Law
Designated Public Forum in General

Constitutional Law
Justification for exclusion or limitation

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1740 Limited Public Forum in General
92k1741 In general
92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1740 Limited Public Forum in General
92k1743 Justification for exclusion or limitation
92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1744 Designated Public Forum in General
92k1745 In general
92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1744 Designated Public Forum in General
92k1747 Justification for exclusion or limitation

Under the First Amendment, a government entity may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects; in such a forum, a government entity may impose restrictions on speech that are reasonable and viewpoint-neutral. U.S.C.A. Const.Amend. 1.

51 Cases that cite this headnote

[11] **Constitutional Law**
Government Property and Events

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1730 In general

Permanent monuments displayed on public property typically represent government speech within the meaning of the First Amendment. U.S.C.A. Const.Amend. 1.

47 Cases that cite this headnote

[12] **Constitutional Law**
Parks and forests

Municipal Corporations
Parks and Public Squares and Places

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1761 Parks and forests
268 Municipal Corporations
268XI Use and Regulation of Public Places, Property, and Works
268XI(C) Public Buildings, Parks, and Other Public Places and Property
268k721 Parks and Public Squares and Places
268k721(1) In general

By allowing placement of donated permanent monuments in public park, city was exercising a form of government speech not subject to scrutiny under the Free Speech Clause, and thus it did not violate religious organization's Free Speech Clause rights by refusing to allow that organization to place another permanent monument in the park; city effectively controlled the messages sent by the monuments in the park by exercising final approval authority over their selection. U.S.C.A. Const.Amend. 1.

41 Cases that cite this headnote

[13] **Constitutional Law**
Parks and forests

Municipal Corporations
Parks and Public Squares and Places

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1761 Parks and forests
268 Municipal Corporations
268XI Use and Regulation of Public Places, Property, and Works
268XI(C) Public Buildings, Parks, and Other Public Places and Property
268k721 Parks and Public Squares and Places
268k721(1) In general

Free speech public forum doctrine did not apply to city's decision whether to accept or reject a donated monument for placement in a city park; park was able to accommodate only a limited number of permanent monuments before the essential function of the land would be defeated. U.S.C.A. Const.Amend. 1.

24 Cases that cite this headnote

**1126 *Syllabus* *

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Pioneer Park (Park), a public park in petitioner Pleasant Grove City (City), has at least 11 permanent, privately donated displays, including a Ten Commandments monument. In rejecting the request of respondent Summum, a religious organization, **1127 to erect a monument containing the Seven Aphorisms of Summum, the City explained that it limited Park monuments to those either directly related to the City's history or donated by groups with longstanding community ties. After the City put that policy and other criteria into writing, respondent renewed its request, but did not describe the monument's historical significance or respondent's connection to the community. The City rejected the request, and respondent filed suit, claiming that the City and petitioner officials had violated the First Amendment's Free Speech Clause by accepting the Ten Commandments monument but rejecting respondent's proposed monument. The District

Court denied respondent's preliminary injunction request, but the Tenth Circuit reversed. Noting that it had previously found the Ten Commandments monument to be private rather than government speech and that public parks have traditionally been regarded as public forums, the court held that, because the exclusion of the monument was unlikely to survive strict scrutiny, the City was required to erect it immediately.

Held: The placement of a permanent monument in a public park is a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause. Pp. 1130 – 1138.

(a) Because that Clause restricts government regulation of private speech but not government speech, whether petitioners were engaging in their own expressive conduct or providing a forum for private speech determines which precedents govern here. Pp. 1130 – 1132.

(1) A government entity "is entitled to say what it wishes," *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700, and to select the views that it wants to express, see, *e.g., Rust v. Sullivan,* 500 U.S. 173, 194, 111 S.Ct. 1759, 114 L.Ed.2d 233. It may exercise this same freedom when it receives private assistance for the purpose of delivering a government-controlled message. See *Johanns v. Livestock Marketing Assn.,* 544 U.S. 550, 562, 125 S.Ct. 2055, 161 L.Ed.2d 896. This does not mean that there are no restraints on government speech. For example, government speech must comport with the Establishment Clause. In addition, public officials' involvement in advocacy may be limited by law, regulation, or practice; and a government entity is ultimately "accountable to the electorate and the political process for its advocacy," *Board of Regents of Univ. of Wis. System v. Southworth,* 529 U.S. 217, 235, 120 S.Ct. 1346, 146 L.Ed.2d 193. Pp. 1130 – 1132.

(2) In contrast, government entities are strictly limited in their ability to regulate private speech in "traditional public fora." *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.,* 473 U.S. 788, 800, 105 S.Ct. 3439, 87 L.Ed.2d 567. Reasonable time, place, and manner restrictions are allowed, see *Perry Ed. Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794, but content-based restrictions must satisfy strict scrutiny, *i.e.,* they must be narrowly tailored to serve a compelling government interest, see *Cornelius, supra,* at 800, 105 S.Ct. 3439. Restrictions based on viewpoint are also prohibited. *Carey v. Brown,* 447 U.S. 455, 463, 100 S.Ct. 2286, 65 L.Ed.2d 263. Government restrictions on speech in a "designated public forum" are subject to the same strict scrutiny as restrictions in a traditional public forum. *Cornelius, supra,* at 800, 105 S.Ct. 3439. And where government creates a forum that is limited to use by certain groups or dedicated to the discussion of certain subjects, *Perry Ed. Assn., supra,* at 46, n. 7, 103 S.Ct. 948, it may impose reasonable and viewpoint-neutral restrictions, see *Good News Club* ****1128** *v. Milford Central School,* 533 U.S. 98, 106–107, 121 S.Ct. 2093, 150 L.Ed.2d 151. Pp. 1132 – 1133.

(b) Permanent monuments displayed on public property typically represent government speech. Governments have long used monuments to speak to the public. Thus, a government-commissioned and government-financed monument placed on public land constitutes government speech. So, too, are privately financed and donated monuments that the government accepts for public display on government land. While government entities regularly accept privately funded or donated monuments, their general practice has been one of selective receptivity. Because city parks play an important role in defining the identity that a city projects to its residents and the outside world, cities take care in accepting donated monuments, selecting those that portray what the government decisionmakers view as appropriate for the place in question, based on esthetics, history, and local culture. The accepted monuments are meant to convey and have the effect of conveying a government message and thus constitute government speech. Pp. 1133 – 1134.

(c) Here, the Park's monuments clearly represent government speech. Although many were donated in completed form by private entities, the City has "effectively controlled" their messages by exercising "final approval authority" over their selection. *Johanns, supra,* at 560–561, 125 S.Ct. 2055. The City has selected monuments that present the image that the City wishes to project to Park visitors; it has taken ownership of most of the monuments in the Park, including the Ten Commandments monument; and it has now expressly set out selection criteria. P. 1134.

(d) Respondent's legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain viewpoints does not mean that a government

entity should be required to embrace publicly a privately donated monument's "message" in order to escape Free Speech Clause restrictions. A city engages in expressive conduct by accepting and displaying a privately donated monument, but it does not necessarily endorse the specific meaning that any particular donor sees in the monument. A government's message may be altered by the subsequent addition of other monuments in the same vicinity. It may also change over time. Pp. 1134 – 1136.

(e) "[P]ublic forum principles ... are out of place in the context of this case." *United States v. American Library Assn., Inc.,* 539 U.S. 194, 205, 123 S.Ct. 2297, 156 L.Ed.2d 221. The forum doctrine applies where a government property or program is capable of accommodating a large number of public speakers without defeating the essential function of the land or program, but public parks can accommodate only a limited number of permanent monuments. If governments must maintain viewpoint neutrality in selecting donated monuments, they must either prepare for cluttered parks or face pressure to remove longstanding and cherished monuments. Were public parks considered traditional public forums for the purpose of erecting privately donated monuments, most parks would have little choice but to refuse all such donations. And if forum analysis would lead almost inexorably to closing of the forum, forum analysis is out of place. *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 115 S.Ct. 2440, 132 L.Ed.2d 650, distinguished. Pp. 1136 – 1138.

483 F.3d 1044, reversed.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C.J., and STEVENS, SCALIA, KENNEDY, ****1129** THOMAS, GINSBURG, and BREYER, JJ., joined. STEVENS, J., filed a concurring opinion, in which GINSBURG, J., joined, *post*, pp. 1138 – 1139. SCALIA, J., filed a concurring opinion, in which THOMAS, J., joined, *post*, pp. 1139 – 1140. BREYER, J., filed a concurring opinion, *post*, pp. 1140 – 1141. SOUTER, J., filed an opinion concurring in the judgment, *post*, pp. 1141 – 1142.

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Opinion

Justice ALITO delivered the opinion of the Court.

***464** This case presents the question whether the Free Speech Clause of the First Amendment entitles a private group to insist that a municipality permit it to place a permanent monument in a city park in which other donated monuments were previously erected. The Court of Appeals held that the municipality was required to accept the monument because a public park is a traditional public forum. We conclude, however, that although a park is a traditional public forum for speeches and other transitory expressive acts, the display of a permanent monument in a public park is not a form of expression to which forum analysis applies. Instead, the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause.

I

A

Pioneer Park (or Park) is a 2.5-acre public park located in the Historic District of Pleasant Grove City (or City) in Utah. The Park currently contains 15 permanent displays,

at least 11 of which were donated by private groups or individuals. ***465** These include a historic granary, a wishing well, the City's first fire station, a September 11 monument, and a Ten Commandments monument donated by the Fraternal Order of Eagles in 1971.

Respondent Summum is a religious organization founded in 1975 and headquartered in Salt Lake City, Utah. On two separate occasions in 2003, Summum's president wrote a letter to the City's mayor requesting permission to erect a "stone monument," which would contain "the Seven Aphorisms of SUMMUM" [1] and be similar ****1130** in size and nature to the Ten Commandments monument. App. 57, 59. The City denied the requests and explained that its practice was to limit monuments in the Park to those that "either (1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with longstanding ties to the Pleasant Grove community." *Id.,* at 61. The following year, the City passed a resolution putting this policy into writing. The resolution also mentioned other criteria, such as safety and esthetics.

1 Respondent's brief describes the church and the Seven Aphorisms as follows:

> "The Summum church incorporates elements of Gnostic Christianity, teaching that spiritual knowledge is experiential and that through devotion comes revelation, which 'modifies human perceptions, and transfigures the individual.' *See* The Teachings of Summum are the Teachings of Gnostic Christianity, http://www.summum.us/ philosophy/ gnosticism.shtml (visited Aug. 15, 2008).
>
> "Central to Summum religious belief and practice are the Seven Principles of Creation (the 'Seven Aphorisms'). According to Summum doctrine, the Seven Aphorisms were inscribed on the original tablets handed down by God to Moses on Mount Sinai .... Because Moses believed that the Israelites were not ready to receive the Aphorisms, he shared them only with a select group of people. In the Summum Exodus account, Moses then destroyed the original tablets, traveled back to Mount Sinai, and returned with a second set of tablets containing the Ten Commandments. *See* The Aphorisms of Summum and the Ten Commandments, http://www.summum.us/ philosophy/ tencommandments.shtml (visited Aug. 15, 2008)." Brief for Respondent 1–2.

***466** In May 2005, respondent's president again wrote to the mayor asking to erect a monument, but the letter did not describe the monument, its historical significance, or Summum's connection to the community. The city council rejected this request.

B

In 2005, respondent filed this action against the City and various local officials (petitioners), asserting, among other claims, that petitioners had violated the Free Speech Clause of the First Amendment by accepting the Ten Commandments monument but rejecting the proposed Seven Aphorisms monument. Respondent sought a preliminary injunction directing the City to permit Summum to erect its monument in Pioneer Park. After the District Court denied Summum's preliminary injunction request, No. 2:05CV00638, 2006 WL 3421838 (D.Utah, Nov. 22, 2006), respondent appealed, pressing solely its free speech claim.

A panel of the Tenth Circuit reversed. 483 F.3d 1044 (2007). The panel noted that it had previously found the Ten Commandments monument to be private rather than government speech. See *Summum v. Ogden,* 297 F.3d 995 (2002). Noting that public parks have traditionally been regarded as public forums, the panel held that the City could not reject the Seven Aphorisms monument unless it had a compelling justification that could not be served by more narrowly tailored means. See 483 F.3d, at 1054. The panel then concluded that the exclusion of respondent's monument was unlikely to survive this strict scrutiny, and the panel therefore held that the City was required to erect Summum's monument immediately.

The Tenth Circuit denied the City's petition for rehearing en banc by an equally divided vote. 499 F.3d 1170 (2007). Judge Lucero dissented, arguing that the Park was not a traditional public forum for the purpose of displaying monuments. *Id.*, at 1171. Judge McConnell also dissented, contending ***467** that the monuments in the Park constitute government speech. *Id.*, at 1174.

We granted certiorari, 552 U.S. 1294, 128 S.Ct. 1737, 170 L.Ed.2d 537 (2008), and now reverse.

****1131** II

No prior decision of this Court has addressed the application of the Free Speech Clause to a government entity's acceptance of privately donated, permanent monuments for installation in a public park, and the parties disagree sharply about the line of precedents that governs this situation. Petitioners contend that the pertinent cases are those concerning government speech. Respondent, on the other hand, agrees with the Court of Appeals panel that the applicable cases are those that analyze private speech in a public forum. The parties' fundamental disagreement thus centers on the nature of petitioners' conduct when they permitted privately donated monuments to be erected in Pioneer Park. Were petitioners engaging in their own expressive conduct? Or were they providing a forum for private speech?

A

[1] **[2]** If petitioners were engaging in their own expressive conduct, then the Free Speech Clause has no application. The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. See *Johanns v. Livestock Marketing Assn.,* 544 U.S. 550, 553, 125 S.Ct. 2055, 161 L.Ed.2d 896 (2005) ("[T]he Government's own speech ... is exempt from First Amendment scrutiny"); *Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94, 139, n. 7, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973) (Stewart, J., concurring) ("Government is not restrained by the First Amendment from controlling its own expression"). A government entity has the right to "speak for itself." *Board of Regents of Univ. of Wis. System v. Southworth,* 529 U.S. 217, 229, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000). "[I]t is entitled to say what it wishes," *Rosenberger v. Rector and Visitors of Univ.* ***468** *of Va.,* 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), and to select the views that it wants to express, see *Rust v. Sullivan,* 500 U.S. 173, 194, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991); *National Endowment for Arts v. Finley,* 524 U.S. 569, 598, 118 S.Ct. 2168, 141 L.Ed.2d 500 (1998) (SCALIA, J., concurring in judgment) ("It is the very business of government to favor and disfavor points of view").

Indeed, it is not easy to imagine how government could function if it lacked this freedom. "If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed." *Keller v. State Bar of Cal.,* 496 U.S. 1, 12–13, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990). See also *Johanns,* 544 U.S., at 574, 125 S.Ct. 2055 (SOUTER, J., dissenting) ("To govern, government has to say something, and a First Amendment heckler's veto of any forced contribution to raising the government's voice in the 'marketplace of ideas' would be out of the question" (footnote omitted)).

[3] A government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message. See *id.,* at 562, 125 S.Ct. 2055 (opinion of the Court) (where the government controls the message, "it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources"); *Rosenberger, supra,* at 833, 115 S.Ct. 2510 (a government entity may "regulate the content of what is or is not expressed ... when it enlists private entities to convey its own message").

[4] This does not mean that there are no restraints on government speech. For ****1132** example, government speech must comport with the Establishment Clause. The involvement of public officials in advocacy may be limited by law, regulation, or practice. And of course, a government entity is ultimately "accountable to the electorate and the political process for its advocacy." *Southworth,* 529 U.S., at 235, 120 S.Ct. 1346. "If the ***469** citizenry objects, newly elected officials later could espouse some different or contrary position." *Ibid.*

B

[5] **[6]** **[7]** While government speech is not restricted by the Free Speech Clause, the government does not have a free hand to regulate private speech on government property. This Court long ago recognized that members of the public retain strong free speech rights when they venture into public streets and parks, "which 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes

of assembly, communicating thoughts between citizens, and discussing public questions.' " *Perry Ed. Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983) (quoting *Hague v. Committee for Industrial Organization,* 307 U.S. 496, 515, 59 S.Ct. 954, 83 L.Ed. 1423 (1939) (opinion of Roberts, J.)). In order to preserve this freedom, government entities are strictly limited in their ability to regulate private speech in such "traditional public fora." *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.,* 473 U.S. 788, 800, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). Reasonable time, place, and manner restrictions are allowed, see *Perry Ed. Assn., supra,* at 45, 103 S.Ct. 948, but any restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest, see *Cornelius, supra,* at 800, 105 S.Ct. 3439, and restrictions based on viewpoint are prohibited, see *Carey v. Brown,* 447 U.S. 455, 463, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980).

[8] **[9]** With the concept of the traditional public forum as a starting point, this Court has recognized that members of the public have free speech rights on other types of government property and in certain other government programs that share essential attributes of a traditional public forum. We have held that a government entity may create "a designated public forum" if government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose. See *Cornelius,* 473 U.S., at 802, 105 S.Ct. 3439. Government ***470** restrictions on speech in a designated public forum are subject to the same strict scrutiny as restrictions in a traditional public forum. *Id.,* at 800, 105 S.Ct. 3439.

[10] The Court has also held that a government entity may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects. *Perry Ed. Assn., supra,* at 46, n. 7, 103 S.Ct. 948. In such a forum, a government entity may impose restrictions on speech that are reasonable and viewpoint neutral. See *Good News Club v. Milford Central School,* 533 U.S. 98, 106–107, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001).

III

[11] There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech, but this case does not present such a situation. Permanent monuments displayed on public property typically represent government speech.

Governments have long used monuments to speak to the public. Since ancient ****1133** times, kings, emperors, and other rulers have erected statues of themselves to remind their subjects of their authority and power. Triumphal arches, columns, and other monuments have been built to commemorate military victories and sacrifices and other events of civic importance. A monument, by definition, is a structure that is designed as a means of expression. When a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure. Neither the Court of Appeals nor respondent disputes the obvious proposition that a monument that is commissioned and financed by a government body for placement on public land constitutes government speech.

Just as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government ***471** accepts and displays to the public on government land. It certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated. And because property owners typically do not permit the construction of such monuments on their land, persons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner's behalf. In this context, there is little chance that observers will fail to appreciate the identity of the speaker. This is true whether the monument is located on private property or on public property, such as national, state, or city park land.

We think it is fair to say that throughout our Nation's history, the general government practice with respect to donated monuments has been one of selective receptivity. A great many of the monuments that adorn the Nation's public parks were financed with private funds or donated by private parties. Sites managed by the National Park Service contain thousands of privately designed or funded commemorative objects, including the Statue of Liberty, the Marine Corps War Memorial (the Iwo Jima monument), and the Vietnam Veterans Memorial. States

and cities likewise have received thousands of donated monuments. See, *e.g.,* App. to Brief for International Municipal Lawyers Association as *Amicus Curiae* 15a–29a (hereinafter IMLA Brief) (listing examples); Brief for American Legion et al. as *Amici Curiae* 7, and n. 2 (same). By accepting monuments that are privately funded or donated, government entities save tax dollars and are able to acquire monuments that they could not have afforded to fund on their own.

But while government entities regularly accept privately funded or donated monuments, they have exercised selectivity. An example discussed by the city of New York as *amicus curiae* is illustrative. In the wake of the controversy generated in 1876 when the city rejected the donor's ***472** proposed placement of a donated monument to honor Daniel Webster, the city adopted rules governing the acceptance of artwork for permanent placement in city parks, requiring, among other things, that "any proposed gift of art had to be viewed either in its finished condition or as a model before acceptance." Brief for City of New York as *Amicus Curiae* 4–5 (hereinafter NYC Brief). Across the country, "municipalities generally exercise editorial control over donated monuments through prior submission requirements, design input, requested modifications, written criteria, and legislative approvals of specific content proposals." IMLA Brief 21.

Public parks are often closely identified in the public mind with the government unit that owns the land. City parks— ****1134** ranging from those in small towns, like Pioneer Park in Pleasant Grove City, to those in major metropolises, like Central Park in New York City—commonly play an important role in defining the identity that a city projects to its own residents and to the outside world. Accordingly, cities and other jurisdictions take some care in accepting donated monuments. Government decisionmakers select the monuments that portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture. The monuments that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.

IV

A

[12] In this case, it is clear that the monuments in Pleasant Grove's Pioneer Park represent government speech. Although many of the monuments were not designed or built by the City and were donated in completed form by private entities, the City decided to accept those donations and to display them in the Park. Respondent does not claim that ***473** the City ever opened up the Park for the placement of whatever permanent monuments might be offered by private donors. Rather, the City has "effectively controlled" the messages sent by the monuments in the Park by exercising "final approval authority" over their selection. *Johanns,* 544 U.S., at 560–561, 125 S.Ct. 2055. The City has selected those monuments that it wants to display for the purpose of presenting the image of the City that it wishes to project to all who frequent the Park; it has taken ownership of most of the monuments in the Park, including the Ten Commandments monument that is the focus of respondent's concern; and the City has now expressly set forth the criteria it will use in making future selections.

B

Respondent voices the legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint. Respondent's suggested solution is to require a government entity accepting a privately donated monument to go through a formal process of adopting a resolution publicly embracing "the message" that the monument conveys. See Brief for Respondent 33–34, 57.

We see no reason for imposing a requirement of this sort. The parks of this country contain thousands of donated monuments that government entities have used for their own expressive purposes, usually without producing the sort of formal documentation that respondent now says is required to escape Free Speech Clause restrictions. Requiring all of these jurisdictions to go back and proclaim formally that they adopt all of these monuments as their own expressive vehicles would be a pointless exercise that the Constitution does not mandate.

In this case, for example, although respondent argues that Pleasant Grove City has not adequately "controll[ed]

the message," *id.,* at 31, of the Ten Commandments monument, the City took ownership of that monument and put it on permanent ***474** display in a park that it owns and manages and that is linked to the City's identity. All rights previously possessed by the monument's donor have been relinquished. The City's actions provided a more dramatic form of adoption than the sort of formal endorsement that respondent would demand, unmistakably signifying to all Park visitors that the City intends the monument to speak on its behalf. And the ****1135** City has made no effort to abridge the traditional free speech rights—the right to speak, distribute leaflets, etc.—that may be exercised by respondent and others in Pioneer Park.

What respondent demands, however, is that the City "adopt" or "embrace" "the message" that it associates with the monument. *Id.,* at 33–34, 57. Respondent seems to think that a monument can convey only one "message"—which is, presumably, the message intended by the donor—and that, if a government entity that accepts a monument for placement on its property does not formally embrace *that* message, then the government has not engaged in expressive conduct.

This argument fundamentally misunderstands the way monuments convey meaning. The meaning conveyed by a monument is generally not a simple one like " 'Beef. It's What's for Dinner.' " *Johanns, supra,* at 554, 125 S.Ct. 2055. Even when a monument features the written word, the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways. Monuments called to our attention by the briefing in this case illustrate this phenomenon.

What, for example, is "the message" of the Greco–Roman mosaic of the word "Imagine" that was donated to New York City's Central Park in memory of John Lennon? See NYC Brief 18; App. to *id.,* at A5. Some observers may "imagine" the musical contributions that John Lennon would have made if he had not been killed. Others may think of the lyrics of the Lennon song that obviously inspired the mosaic ***475** and may "imagine" a world without religion, countries, possessions, greed, or hunger. [2]

2 The lyrics are as follows:

"Imagine there's no heaven
It's easy if you try
No hell below us
Above us only sky
Imagine all the people
Living for today ...
"Imagine there's no countries
It isn't hard to do
Nothing to kill or die for
And no religion too
Imagine all the people
Living life in peace ...
"You may say I'm a dreamer
But I'm not the only one
I hope someday you'll join us
And the world will be as one
"Imagine no possessions
I wonder if you can
No need for greed or hunger
A brotherhood of man
Imagine all the people
Sharing all the world ...
"You may say I'm a dreamer
But I'm not the only one
I hope someday you'll join us
And the world will live as one." J. Lennon, Imagine, on Imagine (Apple Records 1971).

Or, to take another example, what is "the message" of the "large bronze statue displaying the word 'peace' in many world languages" that is displayed in Fayetteville, Arkansas? [3]

3 See IMLA Brief 6–7.

These text-based monuments are almost certain to evoke different thoughts and sentiments in the minds of different observers, and the effect of monuments that do not contain text is likely to be even more variable. Consider, for example, ***476** the statue of Pancho Villa that was given to the city of Tucson, Arizona, in 1981 by the Government of Mexico with, according to a Tucson publication, "a wry sense of irony." [4] Does this statue commemorate a "revolutionary leader who advocated ****1136** for agrarian reform and the poor" or "a violent bandit"? IMLA Brief 13.

4 The Presidio Trail: A Historical Walking Tour of Downtown Tucson, online at http://www.visittucson.org/includes/media/docs/DowntownTour.pdf (as visited Feb. 24, 2009, and available in Clerk of Court's case file).

Contrary to respondent's apparent belief, it frequently is not possible to identify a single "message" that is conveyed by an object or structure, and consequently, the thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor. [5] By accepting a privately donated monument and placing it on city property, a city engages in expressive conduct, but the intended and perceived significance of that conduct may not coincide with the thinking of the monument's donor or creator. Indeed, when a privately donated memorial is funded by many small donations, the donors themselves may differ in their interpretation of the monument's significance. [6] By accepting such a monument, a government entity does not necessarily endorse ***477** the specific meaning that any particular donor sees in the monument.

5 Museum collections illustrate this phenomenon. Museums display works of art that express many different sentiments, and the significance of a donated work of art to its creator or donor may differ markedly from a museum's reasons for accepting and displaying the work. For example, a painting of a religious scene may have been commissioned and painted to express religious thoughts and feelings. Even if the painting is donated to the museum by a patron who shares those thoughts and feelings, it does not follow that the museum, by displaying the painting, intends to convey or is perceived as conveying the same "message."

6 For example, the Vietnam Veterans Memorial Fund is a private organization that obtained funding from over 650,000 donors for the construction of the memorial itself. These donors expressed a wide range of personal sentiments in contributing money for the memorial. See, *e.g.,* J. Scruggs & J. Swerdlow, To Heal a Nation: The Vietnam Veterans Memorial 23–28, 159 (1985).

The message that a government entity conveys by allowing a monument to remain on its property may also be altered by the subsequent addition of other monuments in the same vicinity. For example, following controversy over the original design of the Vietnam Veterans Memorial, a compromise was reached that called for the nearby addition of a flagstaff and bronze Three Soldiers statue, which many believed changed the overall effect of the memorial. See, *e.g.,* J. Mayo, War Memorials as Political Landscape: The American Experience and Beyond 202–203, 205 (1988); K. Hass, Carried to the Wall: American Memory and the Vietnam Veterans Memorial 15–18 (1998).

The "message" conveyed by a monument may change over time. A study of war memorials found that "people reinterpret" the meaning of these memorials as "historical interpretations" and "the society around them changes." Mayo, *supra,* at 8–9.

A striking example of how the interpretation of a monument can evolve is provided by one of the most famous and beloved public monuments in the United States, the Statue of Liberty. The statue was given to this country by the Third French Republic to express republican solidarity and friendship between the two countries. See J. Res. 6, 44th Cong., 2d Sess. (1877), 19 Stat. 410 (accepting the statue as an "expressive and felicitous memorial of the sympathy of the citizens of our sister Republic"). At the inaugural ceremony, President Cleveland saw the statue as an emblem of international friendship and the widespread influence of American ideals. See Inauguration of the Statue of Liberty Enlightening the World 30 (1887). Only later did the statue come to be viewed as a beacon welcoming immigrants to a land of freedom. See Public Papers of the Presidents, ****1137** Ronald Reagan, Vol. 2, July 3, 1986, pp. 918–919 (1989), Remarks at the Opening Ceremonies of the Statue of Liberty Centennial ***478** Celebration in New York, New York; J. Higham, The Transformation of the Statue of Liberty, in Send These To Me 74–80 (rev. ed.1984).

C

Respondent and the Court of Appeals analogize the installation of permanent monuments in a public park to the delivery of speeches and the holding of marches and demonstrations, and they thus invoke the rule that a public park is a traditional public forum for these activities. But "public forum principles ... are out of place in the context of this case." *United States v. American Library Assn., Inc.,* 539 U.S. 194, 205, 123 S.Ct. 2297, 156 L.Ed.2d 221 (2003) (plurality opinion). The forum doctrine has been applied in situations in which government-owned property or a government program was capable of accommodating a large number of public speakers without defeating the essential function of the land or the program. For example, a park

can accommodate many speakers and, over time, many parades and demonstrations. The Combined Federal Campaign permits hundreds of groups to solicit donations from federal employees. See *Cornelius,* 473 U.S., at 804–805, 105 S.Ct. 3439. A public university's student activity fund can provide money for many campus activities. See *Rosenberger,* 515 U.S., at 825, 115 S.Ct. 2510. A public university's buildings may offer meeting space for hundreds of student groups. See *Widmar v. Vincent,* 454 U.S. 263, 274–275, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981). A school system's internal mail facilities can support the transmission of many messages to and from teachers and school administrators. See *Perry Ed. Assn.,* 460 U.S., at 39, 46–47, 103 S.Ct. 948. See also *Arkansas Ed. Television Comm'n v. Forbes,* 523 U.S. 666, 680–681, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998) (noting that allowing any candidate to participate in a televised political debate would be burdensome on "logistical grounds" and "would result in less speech, not more").

By contrast, public parks can accommodate only a limited number of permanent monuments. Public parks have been used, " 'time out of mind, ... for purposes of assembly, communicating ***479** thoughts between citizens, and discussing public questions,' " *Perry Ed. Assn., supra,* at 45, 103 S.Ct. 948 (quoting *Hague,* 307 U.S., at 515, 59 S.Ct. 954 (opinion of Roberts, J.)), but "one would be hard pressed to find a 'long tradition' of allowing people to permanently occupy public space with any manner of monuments," 499 F.3d, at 1173 (Lucero, J., dissenting from denial of rehearing en banc).

Speakers, no matter how long-winded, eventually come to the end of their remarks; persons distributing leaflets and carrying signs at some point tire and go home; monuments, however, endure. They monopolize the use of the land on which they stand and interfere permanently with other uses of public space. A public park, over the years, can provide a soapbox for a very large number of orators—often, for all who want to speak—but it is hard to imagine how a public park could be opened up for the installation of permanent monuments by every person or group wishing to engage in that form of expression.

Respondent contends that this issue "can be dealt with through content-neutral time, place and manner restrictions, including the option of a ban on all unattended displays." Brief for Respondent 14. On this view, when France presented the Statue of Liberty to the United States in 1884, this country had the option of either (1) declining France's offer or (2) accepting ****1138** the gift, but providing a comparable location in the harbor of New York for other statues of a similar size and nature (*e.g.,* a Statue of Autocracy, if one had been offered by, say, the German Empire or Imperial Russia).

[13] While respondent and some of its *amici* deride the fears expressed about the consequences of the Court of Appeals holding in this case, those concerns are well founded. If government entities must maintain viewpoint neutrality in their selection of donated monuments, they must either "brace themselves for an influx of clutter" or face the pressure to remove longstanding and cherished monuments. ***480** See 499 F.3d, at 1175 (McConnell, J., dissenting from denial of rehearing en banc). Every jurisdiction that has accepted a donated war memorial may be asked to provide equal treatment for a donated monument questioning the cause for which the veterans fought. New York City, having accepted a donated statue of one heroic dog (Balto, the sled dog who brought medicine to Nome, Alaska, during a diphtheria epidemic)[7] may be pressed to accept monuments for other dogs who are claimed to be equally worthy of commemoration. The obvious truth of the matter is that if public parks were considered to be traditional public forums for the purpose of erecting privately donated monuments, most parks would have little choice but to refuse all such donations. And where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place.

7 See NYC Brief 2; App. to Brief for American Catholic Lawyers Association as *Amicus Curiae* 1a–10.

Respondent compares the present case to *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995), but that case involved a very different situation—a request by a private group, the Ku Klux Klan, to erect a cross for a period of 16 days on public property that had been opened up for similar temporary displays, including a Christmas tree and a menorah. See *id.,* at 758, 115 S.Ct. 2440. Although some public parks can accommodate and may be made generally available for temporary private displays, the same is rarely true for permanent monuments.

To be sure, there are limited circumstances in which the forum doctrine might properly be applied to a permanent

monument—for example, if a town created a monument on which all of its residents (or all those meeting some other criterion) could place the name of a person to be honored or some other private message. But as a general matter, forum analysis simply does not apply to the installation of permanent monuments on public property.

***481** V

In sum, we hold that the City's decision to accept certain privately donated monuments while rejecting respondent's is best viewed as a form of government speech. As a result, the City's decision is not subject to the Free Speech Clause, and the Court of Appeals erred in holding otherwise. We therefore reverse.

It is so ordered.

Justice STEVENS, with whom Justice GINSBURG joins, concurring.

This case involves a property owner's rejection of an offer to place a permanent display on its land. While I join the Court's persuasive opinion, I think the reasons justifying the city's refusal would have been equally valid if its acceptance of ****1139** the monument, instead of being characterized as "government speech," had merely been deemed an implicit endorsement of the donor's message. See *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 801–802, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (STEVENS, J., dissenting).

To date, our decisions relying on the recently minted government speech doctrine to uphold government action have been few and, in my view, of doubtful merit. See, *e.g., Garcetti v. Ceballos,* 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006); *Johanns v. Livestock Marketing Assn.,* 544 U.S. 550, 125 S.Ct. 2055, 161 L.Ed.2d 896 (2005); *Rust v. Sullivan,* 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991). The Court's opinion in this case signals no expansion of that doctrine. And by joining the Court's opinion, I do not mean to indicate agreement with our earlier decisions. Unlike other decisions relying on the government speech doctrine, our decision in this case excuses no retaliation for, or coercion of, private speech. Cf. *Garcetti,* 547 U.S., at 438, 126 S.Ct. 1951 (SOUTER, J., dissenting); *Rust,* 500 U.S., at 212, 111 S.Ct. 1759 (Blackmun, J., dissenting). Nor is it likely, given the near certainty that observers will associate permanent displays with the governmental property owner, that the government ***482** will be able to avoid political accountability for the views that it endorses or expresses through this means. Cf. *Johanns,* 544 U.S., at 571–572, 125 S.Ct. 2055 (SOUTER, J., dissenting). Finally, recognizing permanent displays on public property as government speech will not give the government free license to communicate offensive or partisan messages. For even if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution's other proscriptions, including those supplied by the Establishment and Equal Protection Clauses. Together with the checks imposed by our democratic processes, these constitutional safeguards ensure that the effect of today's decision will be limited.

Justice SCALIA, with whom Justice THOMAS joins, concurring.

As framed and argued by the parties, this case presents a question under the Free Speech Clause of the First Amendment. I agree with the Court's analysis of that question and join its opinion in full. But it is also obvious that from the start, the case has been litigated in the shadow of the First Amendment's *Establishment* Clause: the city wary of associating itself too closely with the Ten Commandments monument displayed in the park, lest that be deemed a breach in the so-called "wall of separation between church and State," *Reynolds v. United States,* 98 U.S. 145, 164, 25 L.Ed. 244 (1879); respondent exploiting that hesitation to argue that the monument is not government speech because the city has not sufficiently "adopted" its message. Respondent menacingly observed that while the city could have formally adopted the monument as its own, that "might of course raise Establishment Clause issues." Brief for Respondent 34, n. 11.

The city ought not fear that today's victory has propelled it from the Free Speech Clause frying pan into the Establishment Clause fire. Contrary to respondent's intimations, ***483** there are very good reasons to be confident that the park displays do not violate *any* part of the First Amendment.

In *Van Orden v. Perry,* 545 U.S. 677, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005), this Court upheld against Establishment Clause challenge a virtually identical Ten Commandments monument, donated by ****1140** the very

same organization (the Fraternal Order of Eagles), which was displayed on the grounds surrounding the Texas State Capitol. Nothing in that decision suggested that the outcome turned on a finding that the monument was only "private" speech. To the contrary, all the Justices agreed that government speech was at issue, but the Establishment Clause argument was nonetheless rejected. For the plurality, that was because the Ten Commandments "have an undeniable historical meaning" in addition to their "religious significance," *id.,* at 690, 125 S.Ct. 2854 (opinion of Rehnquist, C. J.). Justice BREYER, concurring in the judgment, agreed that the monument conveyed a permissible secular message, as evidenced by its location in a park that contained multiple monuments and historical markers; by the fact that it had been donated by the Eagles "as part of that organization's efforts to combat juvenile delinquency"; and by the length of time (40 years) for which the monument had gone unchallenged. *Id.,* at 701–703, 125 S.Ct. 2854. See also *id.,* at 739–740, 125 S.Ct. 2854 (SOUTER, J., dissenting).

Even accepting the narrowest reading of the narrowest opinion necessary to the judgment in *Van Orden,* there is little basis to distinguish the monument in this case: Pioneer Park includes "15 permanent displays," *ante,* at 1129 (opinion of the Court); it was donated by the Eagles as part of its national effort to combat juvenile delinquency, Brief for Respondent 3; and it was erected in 1971, *ibid.,* which means it is approaching its (momentous!) 40th anniversary.

The city can safely exhale. Its residents and visitors can now return to enjoying Pioneer Park's wishing well, its historic granary—and, yes, even its Ten Commandments monument—without fear that they are complicit in an establishment of religion.

***484** Justice BREYER, concurring.

I agree with the Court and join its opinion. I do so, however, on the understanding that the "government speech" doctrine is a rule of thumb, not a rigid category. Were Pleasant Grove City (City) to discriminate in the selection of permanent monuments on grounds unrelated to the display's theme, say, solely on political grounds, its action might well violate the First Amendment.

In my view, courts must apply categories such as "government speech," "public forums," "limited public forums," and "nonpublic forums" with an eye toward their purposes—lest we turn "free speech" doctrine into a jurisprudence of labels. Cf. *United States v. Kokinda,* 497 U.S. 720, 740–743, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990) (Brennan, J., dissenting). Consequently, we must sometimes look beyond an initial categorization. And, in doing so, it helps to ask whether a government action burdens speech disproportionately in light of the action's tendency to further a legitimate government objective. See, *e.g.*, *Ysursa v. Pocatello Ed. Assn.,* 555 U.S. 353, at 365 – 370, 129 S.Ct. 1093, 172 L.Ed.2d 770, 2009 WL 436709 (BREYER, J., concurring in part and dissenting in part); *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 404, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (BREYER, J., concurring).

Were we to do so here, we would find—for reasons that the Court sets forth—that the City's action, while preventing Summum from erecting its monument, does not disproportionately restrict Summum's freedom of expression. The City has not closed off its parks to speech; no one claims that the City prevents Summum's members from engaging in speech in a form more transient than a permanent ****1141** monument. Rather, the City has simply reserved some space in the park for projects designed to further other than free-speech goals. And that is perfectly proper. After all, parks do not serve speech-related interests alone. To the contrary, cities use park space to further a variety of recreational, historical, educational, esthetic, and other civic interests. To reserve to the City the power to pick and choose ***485** among proposed monuments according to criteria reasonably related to one or more of these legitimate ends restricts Summum's expression, but, given the impracticality of alternatives and viewed in light of the City's legitimate needs, the restriction is not disproportionate. Analyzed either way, as "government speech" or as a proportionate restriction on Summum's expression, the City's action here is lawful.

Justice SOUTER, concurring in the judgment.

I agree with the Court that the Ten Commandments monument is government speech, that is, an expression of a government's position on the moral and religious issues raised by the subject of the monument. See *Board of Regents of Univ. of Wis. System v. Southworth,* 529 U.S. 217, 235, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000) (noting government speech may "promote [government's] own policies or ... advance a particular idea"). And although the government should lose when the character

of the speech is at issue and its governmental nature has not been made clear, see *Johanns v. Livestock Marketing Assn.,* 544 U.S. 550, 577, 125 S.Ct. 2055, 161 L.Ed.2d 896 (2005) (SOUTER, J., dissenting), I also agree with the Court that the city need not satisfy the particular formality urged by Summum as a condition of recognizing that the expression here falls within the public category. I have qualms, however, about accepting the position that public monuments are government speech categorically. See *ante,* at 1133 ("Just as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land").

Because the government speech doctrine, as Justice STEVENS notes, *ante,* at 1139 (concurring opinion), is "recently minted," it would do well for us to go slow in setting its bounds, which will affect existing doctrine in ways not yet explored. Even though, for example, Establishment Clause issues have been neither raised nor briefed before us, there ***486** is no doubt that this case and its government speech claim has been litigated by the parties with one eye on the Establishment Clause, see *ante,* at 1139 (SCALIA, J., concurring). The interaction between the "government speech doctrine" and Establishment Clause principles has not, however, begun to be worked out.

The case shows that it may not be easy to work out. After today's decision, whenever a government maintains a monument it will presumably be understood to be engaging in government speech. If the monument has some religious character, the specter of violating the Establishment Clause will behoove it to take care to avoid the appearance of a flatout establishment of religion, in the sense of the government's adoption of the tenets expressed or symbolized. In such an instance, there will be safety in numbers, and it will be in the interest of a careful government to accept other monuments to stand nearby, to dilute the appearance of adopting whatever particular religious position the single example alone might stand for. As mementoes and testimonials pile up, however, the chatter may well make it less intuitively obvious that the government is speaking ****1142** in its own right simply by maintaining the monuments.

If a case like that occurred, as suspicion grew that some of the permanent displays were not government speech at all (or at least had an equally private character associated with private donors), a further Establishment Clause prohibition would surface, the bar against preferring some religious speakers over others. See *Wallace v. Jaffree,* 472 U.S. 38, 113, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) (Rehnquist, J., dissenting) ("The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others"). But the government could well argue, as a development of government speech doctrine, that when it expresses its own views, it is free of the Establishment Clause's stricture against discriminating among religious ***487** sects or groups. Under this view of the relationship between the two doctrines, it would be easy for a government to favor some private religious speakers over others by its choice of monuments to accept.

Whether that view turns out to be sound is more than I can say at this point. It is simply unclear how the relatively new category of government speech will relate to the more traditional categories of Establishment Clause analysis, and this case is not an occasion to speculate. It is an occasion, however, to try to keep the inevitable issues open, and as simple as they can be. One way to do that is to recognize that there are circumstances in which government maintenance of monuments does not look like government speech at all. Sectarian identifications on markers in Arlington Cemetery come to mind. And to recognize that is to forgo any categorical rule at this point.

To avoid relying on a *per se* rule to say when speech is governmental, the best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land. This reasonable observer test for governmental character is of a piece with the one for spotting forbidden governmental endorsement of religion in the Establishment Clause cases. See, *e.g., County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573, 630, 635–636, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989) (O'Connor, J., concurring in part and concurring in judgment). The adoption of it would thus serve coherence within Establishment Clause law, and it would make sense of our common understanding that some monuments on public land display religious symbolism that clearly does not express a government's chosen views.

Application of this observer test provides the reason I find the monument here to be government expression.

All Citations

555 U.S. 460, 129 S.Ct. 1125, 172 L.Ed.2d 853, 77 USLW 4136, 09 Cal. Daily Op. Serv. 2261, 2009 Daily Journal D.A.R. 2663, 21 Fla. L. Weekly Fed. S 648

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KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Children First Foundation, Inc. v. Fiala, 2nd Cir. (N.Y.), May 22, 2015

115 S.Ct. 2510
Supreme Court of the United States

Ronald W. ROSENBERGER, et al., Petitioners
v.
RECTOR AND VISITORS OF the UNIVERSITY OF VIRGINIA et al.

No. 94–329.
|
Argued March 1, 1995.
|
Decided June 29, 1995.

Synopsis
University student organization which published newspaper with Christian editorial viewpoint brought action against university challenging denial of funds from fund created by university to make payments to outside contractors for printing costs of publications of student groups. The United States District Court for the Western District of Virginia, 795 F.Supp. 175, granted summary judgment in favor of university, and students appealed. The Court of Appeals for the Fourth Circuit affirmed, 18 F.3d 269, and certiorari was granted. The Supreme Court, Justice Kennedy, held that: (1) denial of funding amounted to viewpoint discrimination; (2) exclusion of several views on an issue is just as offensive to the First Amendment as the exclusion of only one; (3) scarcity of funds does not permit university to discriminate on the basis of viewpoint; and (4) program was neutral toward religion, so that provision of funding would not violate establishment clause.

Reversed.

Justice O'Connor filed a concurring opinion.

Justice Thomas filed a concurring opinion.

Justice Souter filed a dissenting opinion in which Justice Stevens, Justice Ginsburg and Justice Breyer joined.

West Headnotes (14)

[1] **Constitutional Law**
Content-Based Regulations or Restrictions

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1516 Content-Based Regulations or Restrictions
92k1517 In general
(Formerly 92k90(1))

Government may not regulate speech based on its substantive content or message it conveys. U.S.C.A. Const.Amend. 1.

115 Cases that cite this headnote

[2] **Constitutional Law**
Viewpoint or idea discrimination

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1507 Viewpoint or idea discrimination
(Formerly 92k90(1))

In the realm of private speech or expression, government regulation may not favor one speaker over another. U.S.C.A. Const.Amend. 1.

84 Cases that cite this headnote

[3] **Constitutional Law**
Viewpoint or idea discrimination

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1507 Viewpoint or idea discrimination
(Formerly 92k90(1), 92k48(4.1))

Discrimination against speech because of its message is presumed to be unconstitutional. U.S.C.A. Const.Amend. 1.

32 Cases that cite this headnote

[4] **Constitutional Law**
Content-Based Regulations or Restrictions

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1516 Content-Based Regulations or Restrictions
92k1517 In general
(Formerly 92k90(1))

Government offends First Amendment when it imposes financial burdens on certain speakers based on the content of their expression; when government targets not subject matter but particular views taken by speaker on subject, violation of First Amendment is automatically inferred. U.S.C.A. Const.Amend. 1.

143 Cases that cite this headnote

[5] **Constitutional Law**
Viewpoint or idea discrimination

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1507 Viewpoint or idea discrimination
(Formerly 92k90(1))

Viewpoint discrimination is egregious form of content discrimination, and government must abstain from regulating speech when specific motivating ideology or opinion or perspective of speaker is rationale for the restriction. U.S.C.A. Const.Amend. 1.

254 Cases that cite this headnote

[6] **Constitutional Law**
Justification for exclusion or limitation

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1740 Limited Public Forum in General
92k1743 Justification for exclusion or limitation
(Formerly 92k90.1(4))

Necessity of confining limited public forum to limited and legitimate purpose for which it was created may justify state in reserving it for certain groups or discussion of certain topics but, once it has opened limited forum, state must respect lawful boundaries it has itself set and may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, nor may it discriminate against speech on the basis of viewpoint. U.S.C.A. Const.Amend. 1.

258 Cases that cite this headnote

[7] **Constitutional Law**
Justification for exclusion or limitation

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1740 Limited Public Forum in General
92k1743 Justification for exclusion or limitation
(Formerly 92k90.1(4))

In determining whether state is acting to preserve limits of forum it has created so that exclusion of class of speech is legitimate, there is a distinction between content discrimination, which may be permissible if it preserves the purpose of the limited forum, and viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations. U.S.C.A. Const.Amend. 1.

210 Cases that cite this headnote

[8] **Constitutional Law**
Student publications

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press

92XVIII(Q) Education
92XVIII(Q)2 Post-Secondary Institutions
92k2015 Student publications
(Formerly 92k90.1(1.4))

Although forum created by university's funding of printing for student publications is a forum more in a metaphysical than spatial or geographic sense, the same principles with respect to limitations on speech are applicable. U.S.C.A. Const.Amend. 1.

22 Cases that cite this headnote

[9] **Constitutional Law**
Student publications

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Q) Education
92XVIII(Q)2 Post-Secondary Institutions
92k2015 Student publications
(Formerly 92k90.1(1.4))

Where university did not exclude religion as a subject matter for student publications for which it would provide funding for printing but denied funding to student journalistic efforts which had religious editorial viewpoints, First Amendment challenge to the denial of funding would be analyzed from the standpoint of viewpoint discrimination. U.S.C.A. Const.Amend. 1.

99 Cases that cite this headnote

[10] **Constitutional Law**
Viewpoint or idea discrimination

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1507 Viewpoint or idea discrimination
(Formerly 92k90(1))

Exclusion by government of several views on problem under debate is just as offensive to the First Amendment as exclusion of only one, and it is as objectionable to exclude both theistic and atheistic perspectives on the debate as it is to exclude one, the other, or some other political, economic, or social viewpoint. U.S.C.A. Const.Amend. 1.

14 Cases that cite this headnote

[11] **Constitutional Law**
Access to Facilities and Other Public Places;Public Forum Issues
Constitutional Law
Student publications

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Q) Education
92XVIII(Q)2 Post-Secondary Institutions
92k2006 Access to Facilities and Other Public Places;Public Forum Issues
92k2007 In general
(Formerly 92k90.1(1.4))
92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Q) Education
92XVIII(Q)2 Post-Secondary Institutions
92k2015 Student publications
(Formerly 92k90.1(1.4))

University could not discriminate based on viewpoint with respect to access to physical facilities if the demand for space exceeded its availability, and government may not discriminate on the basis of viewpoint with respect to those student publications for which it would provide funding for printing. U.S.C.A. Const.Amend. 1.

115 Cases that cite this headnote

[12] **Constitutional Law**
Neutrality

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(A) In General
92k1294 Establishment of Religion
92k1297 Neutrality
(Formerly 92k84.1, 92k90(1))

Significant factor in upholding governmental programs in the face of establishment clause attack is neutrality towards religion. U.S.C.A. Const.Amend. 1.

37 Cases that cite this headnote

[13] **Education**
Publications
Constitutional Law
Post-Secondary Institutions
141E Education
141EVI Colleges and Universities
141EVI(K) Students
141Ek1192 Extracurricular Activities
141Ek1196 Publications
(Formerly 81k9.45(4) Colleges and Universities)
92 Constitutional Law
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92XIII(B) Particular Issues and Applications
92k1370 Post-Secondary Institutions
92k1371 In general
(Formerly 92k84.5(6), 92k90.1(1.4))

University program which provided funding for printing of student publications was neutral toward religion, and making funds available for publications with religious editorial viewpoint would not violate establishment clause. U.S.C.A. Const.Amend. 1.

67 Cases that cite this headnote

[14] **Constitutional Law**
Post-Secondary Institutions
92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1370 Post-Secondary Institutions
92k1371 In general
(Formerly 92k84.5(6), 92k90.1(1.4))

It does not violate establishment clause for public university to grant access to its facilities on religion neutral basis to wide spectrum of student groups, including groups which use meeting rooms for sectarian activities, accompanied by some devotional exercises, and that is so even where the upkeep, maintenance, and repair of facilities attributed to those uses is paid from student activity fund to which students are required to contribute. U.S.C.A. Const.Amend. 1.

67 Cases that cite this headnote

****2511** *Syllabus* [*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***819** Respondent University of Virginia, a state instrumentality, authorizes payments from its Student Activities Fund (SAF) to outside contractors for the printing costs of a variety of publications issued by student groups called "Contracted Independent Organizations" (CIO's). The SAF receives its money from mandatory student fees and is designed to support a broad range of extracurricular student activities related to the University's educational purpose. CIO's must include in their dealings with third parties and in all written materials a disclaimer stating that they are independent of the University and that the University is not responsible for them. The University withheld authorization for payments to a printer on behalf of petitioners' CIO, Wide Awake Productions (WAP), solely because its student newspaper, Wide Awake: A Christian Perspective at the University of Virginia, ****2512** "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality," as prohibited by the University's SAF Guidelines. Petitioners filed this suit under 42 U.S.C. § 1983, alleging, *inter alia,* that the refusal to authorize payment violated their First Amendment right to freedom of speech. After the District Court granted summary judgment for the University, the Fourth Circuit affirmed, holding that the University's invocation of viewpoint discrimination to deny third-party payment violated the Speech Clause, but concluding that the discrimination was justified by the necessity of complying with the Establishment Clause.

Held:

1. The Guideline invoked to deny SAF support, both in its terms and in its application to these petitioners, is a denial of their right of free speech. Pp. 2516–2520.

(a) The Guideline violates the principles governing speech in limited public forums, which apply to the SAF under, *e.g., Perry Ed. Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 46–47, 103 S.Ct. 948, 955–956, 74 L.Ed.2d 794. In determining whether a State is acting within its power to preserve the limits it has set for such a forum so that the exclusion of a class of speech there is legitimate, see, *e.g., id.,* at 49, 103 S.Ct., at 957, this Court has observed a distinction between, on the one hand, content discrimination—*i.e.,* discrimination ***820** against speech because of its subject matter—which may be permissible if it preserves the limited forum's purposes, and, on the other hand, viewpoint discrimination—*i.e.,* discrimination because of the speaker's specific motivating ideology, opinion, or perspective—which is presumed impermissible when directed against speech otherwise within the forum's limitations, see *id.,* at 46, 103 S.Ct., at 955. The most recent and most apposite case in this area is *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384, 393, 113 S.Ct. 2141, 2147, 124 L.Ed.2d 352, in which the Court held that permitting school property to be used for the presentation of all views on an issue except those dealing with it from a religious standpoint constitutes prohibited viewpoint discrimination. Here, as in that case, the State's actions are properly interpreted as unconstitutional viewpoint discrimination rather than permissible line-drawing based on content: By the very terms of the SAF prohibition, the University does not exclude religion as a subject matter, but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Pp. 2516–2518.

(b) The University's attempt to escape the consequences of *Lamb's Chapel* by urging that this case involves the provision of funds rather than access to facilities is unavailing. Although it may regulate the content of expression when it is the speaker or when it enlists private entities to convey its own message, *Rust v. Sullivan,* 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233; *Widmar v. Vincent,* 454 U.S. 263, 276, 102 S.Ct. 269, 277–278, 70 L.Ed.2d 440, the University may not discriminate based on the viewpoint of private persons whose speech it subsidizes, *Regan v. Taxation with Representation of Wash.,* 461 U.S. 540, 548, 103 S.Ct. 1997, 2002, 76 L.Ed.2d 129. Its argument that the scarcity of public money may justify otherwise impermissible viewpoint discrimination among private speakers is simply wrong. Pp. 2518–2520.

(c) Vital First Amendment speech principles are at stake here. The Guideline at issue has a vast potential reach: The term "promotes" as used there would comprehend any writing advocating a philosophic position that rests upon a belief (or nonbelief) in a deity or ultimate reality, while the term "manifests" would bring within the prohibition any writing resting upon a premise presupposing the existence (or nonexistence) of a deity or ultimate reality. It is difficult to name renowned thinkers whose writings would be accepted, save perhaps for articles disclaiming all connection to their ultimate philosophy. Pp. 2519–2520.

2. The violation following from the University's denial of SAF support to petitioners is not excused by the necessity of complying with the Establishment Clause. Pp. 2520–2525.

(a) The governmental program at issue is neutral toward religion. Such neutrality is a significant factor in upholding programs in ****2513** the face of Establishment Clause attack, and the guarantee of neutrality is not ***821** offended where, as here, the government follows neutral criteria and evenhanded policies to extend benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse, *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet,* 512 U.S. 687, 704, 114 S.Ct. 2481, 2491–2492, 129 L.Ed.2d 546. There is no suggestion that the University created its program to advance religion or aid a religious cause. The SAF's purpose is to open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life. The SAF Guidelines have a separate classification for, and do not make third-party payments on behalf of, "religious organizations," and WAP did not seek a subsidy because of its Christian editorial viewpoint; it sought funding under the Guidelines as a "student ... communications ... grou[p]." Neutrality is also apparent in the fact that the University has taken pains to disassociate itself from the private speech involved in this case. The program's neutrality distinguishes the student fees here from a tax levied for the direct support of a church or group of churches, which would violate the Establishment Clause. Pp. 2520–2523.

(b) This case is not controlled by the principle that special Establishment Clause dangers exist where the government makes direct money payments to sectarian institutions, see, *e.g., Roemer v. Board of Public Works of Md.,* 426 U.S.

736, 747, 96 S.Ct. 2337, 2345, 49 L.Ed.2d 179, since it is undisputed that no public funds flow directly into WAP's coffers under the program at issue. A public university does not violate the Establishment Clause when it grants access to its facilities on a religion-neutral basis to a wide spectrum of student groups, even if some of those groups would use the facilities for devotional exercises. See *e.g., Widmar,* 454 U.S., at 269, 102 S.Ct., at 274. This is so even where the upkeep, maintenance, and repair of those facilities are paid out of a student activities fund to which students are required to contribute. *Id.,* at 265, 102 S.Ct., at 272. There is no difference in logic or principle, and certainly no difference of constitutional significance, between using such funds to operate a facility to which students have access, and paying a third-party contractor to operate the facility on its behalf. That is all that is involved here: The University provides printing services to a broad spectrum of student newspapers. Were the contrary view to become law, the University could only avoid a constitutional violation by scrutinizing the content of student speech, lest it contain too great a religious message. Such censorship would be far more inconsistent with the Establishment Clause's dictates than would governmental provision of secular printing services on a religion-blind basis. Pp. 2523–2525.

18 F.3d 269 (CA4 1994), reversed.

***822** KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and O'CONNOR, SCALIA, and THOMAS, JJ., joined. O'CONNOR, J., *post,* p. 2525, and THOMAS, J., *post,* p. 2528, filed concurring opinions. SOUTER, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined, *post,* p. 2533.

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Opinion

Justice KENNEDY delivered the opinion of the Court.

The University of Virginia, an instrumentality of the Commonwealth for which it is named and thus bound by the First and Fourteenth Amendments, authorizes the payment of outside contractors for the printing costs of a variety of student publications. It withheld any authorization for payments on behalf of petitioners for the sole reason that their student ***823** paper "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality." That the paper did promote or manifest views within the defined exclusion seems plain enough. The challenge is to the University's regulation and its denial of authorization, the case raising issues under the Speech and Establishment Clauses of the First Amendment.

****2514** I

The public corporation we refer to as the "University" is denominated by state law as "the Rector and Visitors of the University of Virginia," Va.Code Ann. § 23–69 (1993), and it is responsible for governing the school, see §§ 23–69 to 23–80. Founded by Thomas Jefferson in 1819, and ranked by him, together with the authorship of the Declaration of Independence and of the Virginia Act for Religious Freedom, Va.Code Ann. § 57–1 (1950), as one of his proudest achievements, the University is among the Nation's oldest and most respected seats of higher learning. It has more than 11,000 undergraduate students, and 6,000 graduate and professional students. An understanding of the case requires a somewhat detailed description of the program the University created to support extracurricular student activities on its campus.

Before a student group is eligible to submit bills from its outside contractors for payment by the fund described below, it must become a "Contracted Independent Organization" (CIO). CIO status is available to any group the majority of whose members are students, whose managing officers are fulltime students, and that complies with certain procedural requirements. App. to Pet. for Cert. 2a. A CIO must file its constitution with the University; must pledge not to discriminate in its membership; and must include in dealings with third parties and in all written materials a disclaimer, stating that the CIO is independent of the University and that the University is not responsible for the CIO. App. 27–28. CIO's enjoy access to University facilities, including meeting rooms and computer terminals. *Id.,* at 30. ***824** A standard agreement signed between each CIO and the University provides that the benefits and opportunities afforded to CIO's "should not be misinterpreted as meaning that those organizations are part of or controlled

by the University, that the University is responsible for the organizations' contracts or other acts or omissions, or that the University approves of the organizations' goals or activities." *Id.,* at 26.

All CIO's may exist and operate at the University, but some are also entitled to apply for funds from the Student Activities Fund (SAF). Established and governed by University Guidelines, the purpose of the SAF is to support a broad range of extracurricular student activities that "are related to the educational purpose of the University." App. to Pet. for Cert. 61a. The SAF is based on the University's "recogni[tion] that the availability of a wide range of opportunities" for its students "tends to enhance the University environment." App. 26. The Guidelines require that it be administered "in a manner consistent with the educational purpose of the University as well as with state and federal law." App. to Pet. for Cert. 61a. The SAF receives its money from a mandatory fee of $14 per semester assessed to each full-time student. The Student Council, elected by the students, has the initial authority to disburse the funds, but its actions are subject to review by a faculty body chaired by a designee of the Vice President for Student Affairs. Cf. *id.,* at 63a–64a.

Some, but not all, CIO's may submit disbursement requests to the SAF. The Guidelines recognize 11 categories of student groups that may seek payment to third-party contractors because they "are related to the educational purpose of the University of Virginia." *Id.,* at 61a–62a. One of these is "student news, information, opinion, entertainment, or academic communications media groups." *Id.,* at 61a. The Guidelines also specify, however, that the costs of certain activities of CIO's that are otherwise eligible for funding ***825** will not be reimbursed by the SAF. The student activities that are excluded from SAF support are religious activities, philanthropic contributions and activities, political activities, activities that would jeopardize the University's tax-exempt status, those which involve payment of honoraria or similar fees, or social entertainment or related expenses. *Id.,* at 62a–63 a. The prohibition on "political activities" is defined so that it is limited to electioneering and lobbying. The Guidelines provide that "[t]hese restrictions on funding political activities are not intended to preclude funding of any otherwise eligible student organization which ... espouses particular positions or ideological viewpoints, including those that may be unpopular or are ****2515** not generally accepted." *Id.,* at 65a–66a. A "religious activity," by contrast, is defined as any activity that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality." *Id.,* at 66a.

The Guidelines prescribe these criteria for determining the amounts of third-party disbursements that will be allowed on behalf of each eligible student organization: the size of the group, its financial self-sufficiency, and the University-wide benefit of its activities. If an organization seeks SAF support, it must submit its bills to the Student Council, which pays the organization's creditors upon determining that the expenses are appropriate. No direct payments are made to the student groups. During the 1990–1991 academic year, 343 student groups qualified as CIO's. One hundred thirty-five of them applied for support from the SAF, and 118 received funding. Fifteen of the groups were funded as "student news, information, opinion, entertainment, or academic communications media groups."

Petitioners' organization, Wide Awake Productions (WAP), qualified as a CIO. Formed by petitioner Ronald Rosenberger and other undergraduates in 1990, WAP was established "[t]o publish a magazine of philosophical and religious expression," "[t]o facilitate discussion which fosters an atmosphere ***826** of sensitivity to and tolerance of Christian viewpoints," and "[t]o provide a unifying focus for Christians of multicultural backgrounds." App. 67. WAP publishes Wide Awake: A Christian Perspective at the University of Virginia. The paper's Christian viewpoint was evident from the first issue, in which its editors wrote that the journal "offers a Christian perspective on both personal and community issues, especially those relevant to college students at the University of Virginia." App. 45. The editors committed the paper to a two-fold mission: "to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means." *Ibid.* The first issue had articles about racism, crisis pregnancy, stress, prayer, C.S. Lewis' ideas about evil and free will, and reviews of religious music. In the next two issues, Wide Awake featured stories about homosexuality, Christian missionary work, and eating disorders, as well as music reviews and interviews with University professors. Each page of Wide Awake, and the end of each article or review, is marked by a cross. The advertisements carried in Wide Awake also reveal the Christian perspective of the journal.

For the most part, the advertisers are churches, centers for Christian study, or Christian bookstores. By June 1992, WAP had distributed about 5,000 copies of Wide Awake to University students, free of charge.

WAP had acquired CIO status soon after it was organized. This is an important consideration in this case, for had it been a "religious organization," WAP would not have been accorded CIO status. As defined by the Guidelines, a "[r]eligious [o]rganization" is "an organization whose purpose is to practice a devotion to an acknowledged ultimate reality or deity." App. to Pet. for Cert. 66a. At no stage in this controversy has the University contended that WAP is such an organization.

***827** A few months after being given CIO status, WAP requested the SAF to pay its printer $5,862 for the costs of printing its newspaper. The Appropriations Committee of the Student Council denied WAP's request on the ground that Wide Awake was a "religious activity" within the meaning of the Guidelines, *i.e.,* that the newspaper "promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality." *Ibid.* It made its determination after examining the first issue. App. 54. WAP appealed the denial to the full Student Council, contending that WAP met all the applicable Guidelines and that denial of SAF support on the basis of the magazine's religious perspective violated the Constitution. The appeal was denied without further comment, and WAP appealed to the next level, the Student Activities Committee. In a letter signed by the Dean of Students, the committee sustained the denial of funding. App. 55.

Having no further recourse within the University structure, WAP, Wide Awake, and three of its editors and members filed suit in ****2516** the United States District Court for the Western District of Virginia, challenging the SAF's action as violative of Rev.Stat. § 1979, 42 U.S.C. § 1983. They alleged that refusal to authorize payment of the printing costs of the publication, solely on the basis of its religious editorial viewpoint, violated their rights to freedom of speech and press, to the free exercise of religion, and to equal protection of the law. They relied also upon Article I of the Virginia Constitution and the Virginia Act for Religious Freedom, Va.Code Ann. §§ 57–1, 57–2 (1986 and Supp.1994), but did not pursue those theories on appeal. The suit sought damages for the costs of printing the paper, injunctive and declaratory relief, and attorney's fees.

On cross-motions for summary judgment, the District Court ruled for the University, holding that denial of SAF support was not an impermissible content or viewpoint discrimination ***828** against petitioners' speech, and that the University's Establishment Clause concern over its "religious activities" was a sufficient justification for denying payment to third-party contractors. The court did not issue a definitive ruling on whether reimbursement, had it been made here, would or would not have violated the Establishment Clause. 795 F.Supp. 175, 181–182 (WD Va.1992).

The United States Court of Appeals for the Fourth Circuit, in disagreement with the District Court, held that the Guidelines did discriminate on the basis of content. It ruled that, while the State need not underwrite speech, there was a presumptive violation of the Speech Clause when viewpoint discrimination was invoked to deny third-party payment otherwise available to CIO's. 18 F.3d 269, 279–281 (1994). The Court of Appeals affirmed the judgment of the District Court nonetheless, concluding that the discrimination by the University was justified by the "compelling interest in maintaining strict separation of church and state." *Id.,* at 281. We granted certiorari, 513 U.S. 959, 115 S.Ct. 959, 130 L.Ed.2d 333 (1994).

II

[1] [2] [3] [4] [5] It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 96, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212 (1972). Other principles follow from this precept. In the realm of private speech or expression, government regulation may not favor one speaker over another. *Members of City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 804, 104 S.Ct. 2118, 2128, 80 L.Ed.2d 772 (1984). Discrimination against speech because of its message is presumed to be unconstitutional. See *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 641–643, 114 S.Ct. 2445, 2458–2460, 129 L.Ed.2d 497 (1994). These rules informed our determination that the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression. ***829** *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 115, 112 S.Ct. 501, 507–508, 116 L.Ed.2d 476

(1991). When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. See *R.A.V. v. St. Paul,* 505 U.S. 377, 391, 112 S.Ct. 2538, 2547, 120 L.Ed.2d 305 (1992). Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction. See *Perry Ed. Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 46, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983).

[6] **[7]** These principles provide the framework forbidding the State to exercise viewpoint discrimination, even when the limited public forum is one of its own creation. In a case involving a school district's provision of school facilities for private uses, we declared that "[t]here is no question that the District, like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated." *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384, 390, 113 S.Ct. 2141, 2146, 124 L.Ed.2d 352 (1993). The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of ****2517** certain topics. See, *e.g., Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.,* 473 U.S. 788, 806, 105 S.Ct. 3439, 3451, 87 L.Ed.2d 567 (1985); *Perry Ed. Assn., supra,* at 49, 103 S.Ct., at 957. Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not "reasonable in light of the purpose served by the forum," *Cornelius, supra,* at 804–806, 105 S.Ct. at 3450–51; see also *Perry Ed. Assn., supra,* at 46, 49, 103 S.Ct., at 955, 957, nor may it discriminate against speech on the basis of its viewpoint, *Lamb's Chapel, supra,* at 392–393, 113 S.Ct., at 2147; see also *Perry Ed. Assn., supra,* at 46, 103 S.Ct., at 955; *R.A.V., supra,* at 386–388, 391–393, 112 S.Ct., at 2544–2546, 2547–2549; cf. *Texas v. Johnson,* 491 U.S. 397, 414–415, 109 S.Ct. 2533, 2545, 105 L.Ed.2d 342 (1989). Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, ***830** on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations. See *Perry Ed. Assn., supra,* at 46, 103 S.Ct., at 955.

[8] The SAF is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable. See, *e.g., Perry Ed. Assn., supra,* at 46–47, 103 S.Ct., at 955–956 (forum analysis of a school mail system); *Cornelius, supra,* at 801, 105 S.Ct., at 3448 (forum analysis of charitable contribution program). The most recent and most apposite case is our decision in *Lamb's Chapel, supra.* There, a school district had opened school facilities for use after school hours by community groups for a wide variety of social, civic, and recreational purposes. The district, however, had enacted a formal policy against opening facilities to groups for religious purposes. Invoking its policy, the district rejected a request from a group desiring to show a film series addressing various child-rearing questions from a "Christian perspective." There was no indication in the record in *Lamb's Chapel* that the request to use the school facilities was "denied, for any reason other than the fact that the presentation would have been from a religious perspective." 508 U.S., at 393–394, 113 S.Ct., at 2147. Our conclusion was unanimous: "[I]t discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and childrearing except those dealing with the subject matter from a religious standpoint." *Id.*, at 393, 113 S.Ct., at 2147.

[9] The University does acknowledge (as it must in light of our precedents) that "ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts," but insists that this case does not present that issue because the Guidelines draw lines based on content, not viewpoint. Brief for Respondents 17, n. 10. As we have noted, discrimination against one set of ***831** views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination. See, *e.g., R.A.V., supra,* at 391, 112 S.Ct., at 2146. And, it must be acknowledged, the distinction is not a precise one. It is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought. The nature of our origins and destiny and their dependence upon the existence of a divine being have been subjects of philosophic inquiry throughout human history. We conclude, nonetheless, that here, as in *Lamb's Chapel,* viewpoint discrimination is the proper way to interpret

the University's objections to Wide Awake. By the very terms of the SAF prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the ****2518** subjects discussed were otherwise within the approved category of publications.

[10] The dissent's assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech. Our understanding of the complex and multifaceted nature of public discourse has not embraced such a contrived description of the marketplace of ideas. If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint. The dissent's declaration that debate is not skewed so long as multiple ***832** voices are silenced is simply wrong; the debate is skewed in multiple ways.

The University's denial of WAP's request for third-party payments in the present case is based upon viewpoint discrimination not unlike the discrimination the school district relied upon in *Lamb's Chapel* and that we found invalid. The church group in *Lamb's Chapel* would have been qualified as a social or civic organization, save for its religious purposes. Furthermore, just as the school district in *Lamb's Chapel* pointed to nothing but the religious views of the group as the rationale for excluding its message, so in this case the University justifies its denial of SAF participation to WAP on the ground that the contents of Wide Awake reveal an avowed religious perspective. See *supra,* at 2515. It bears only passing mention that the dissent's attempt to distinguish *Lamb's Chapel* is entirely without support in the law. Relying on the transcript of oral argument, the dissent seems to argue that we found viewpoint discrimination in that case because the government excluded Christian, but not atheistic, viewpoints from being expressed in the forum there. *Post,* at 2550–2551, and n. 13. The Court relied on no such distinction in holding that discriminating against religious speech was discriminating on the basis of viewpoint. There is no indication in the opinion of the Court (which, unlike an advocate's statements at oral argument, is the law) that exclusion or inclusion of other religious or antireligious voices from that forum had any bearing on its decision.

The University tries to escape the consequences of our holding in *Lamb's Chapel* by urging that this case involves the provision of funds rather than access to facilities. The University begins with the unremarkable proposition that the State must have substantial discretion in determining how to allocate scarce resources to accomplish its educational mission. Citing our decisions in *Rust v. Sullivan,* 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991), *Regan v. Taxation with Representation of Wash.,* 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983), and ***833** *Widmar v. Vincent,* 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 1981), the University argues that content-based funding decisions are both inevitable and lawful. Were the reasoning of *Lamb's Chapel* to apply to funding decisions as well as to those involving access to facilities, it is urged, its holding "would become a judicial juggernaut, constitutionalizing the ubiquitous content-based decisions that schools, colleges, and other government entities routinely make in the allocation of public funds." Brief for Respondents 16.

To this end the University relies on our assurance in *Widmar v. Vincent, supra.* There, in the course of striking down a public university's exclusion of religious groups from use of school facilities made available to all other student groups, we stated: "Nor do we question the right of the University to make academic judgments as to how best to allocate scarce resources." 454 U.S., at 276, 102 S.Ct., at 277. The quoted language in *Widmar* was but a proper recognition of the principle that when the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message. In the same vein, in *Rust v. Sullivan,* ****2519** *supra,* we upheld the government's prohibition on abortion-related advice applicable to recipients of federal funds for family

planning counseling. There, the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program. We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. 500 U.S., at 194, 111 S.Ct., at 1773. When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee. See *id.,* at 196–200, 111 S.Ct., at 1774–1776.

***834** It does not follow, however, and we did not suggest in *Widmar,* that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers. A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles. See, *e.g., Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens,* 496 U.S. 226, 250, 110 S.Ct. 2356, 2372, 110 L.Ed.2d 191 (1990); *Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260, 270–272, 108 S.Ct. 562, 569–570, 98 L.Ed.2d 592 (1988). For that reason, the University's reliance on *Regan v. Taxation with Representation of Wash., supra,* is inapposite as well. *Regan* involved a challenge to Congress' choice to grant tax deductions for contributions made to veterans' groups engaged in lobbying, while denying that favorable status to other charities which pursued lobbying efforts. Although acknowledging that the Government is not required to subsidize the exercise of fundamental rights, see 461 U.S., at 545–546, 103 S.Ct., at 2001, we reaffirmed the requirement of viewpoint neutrality in the Government's provision of financial benefits by observing that "[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas,' " see *id.,* at 548, 103 S.Ct., at 2002 (quoting *Cammarano v. United States,* 358 U.S. 498, 513, 79 S.Ct. 524, 533, 3 L.Ed.2d 462 (1959), in turn quoting *Speiser v. Randall,* 357 U.S. 513, 519, 78 S.Ct. 1332, 1338, 2 L.Ed.2d 1460 (1958)). *Regan* relied on a distinction based on preferential treatment of certain speakers—veterans' organizations—and not a distinction based on the content or messages of those groups' speech. 461 U.S., at 548, 103 S.Ct., at 2002; cf. *Perry Ed. Assn.,* 460 U.S., at 49, 103 S.Ct., at 957. The University's regulation now before us, however, has a speech-based restriction as its sole rationale and operative principle.

The distinction between the University's own favored message and the private speech of students is evident in the case before us. The University itself has taken steps to ensure ***835** the distinction in the agreement each CIO must sign. See *supra,* at 2514. The University declares that the student groups eligible for SAF support are not the University's agents, are not subject to its control, and are not its responsibility. Having offered to pay the third-party contractors on behalf of private speakers who convey their own messages, the University may not silence the expression of selected viewpoints.

[11] The University urges that, from a constitutional standpoint, funding of speech differs from provision of access to facilities because money is scarce and physical facilities are not. Beyond the fact that in any given case this proposition might not be true as an empirical matter, the underlying premise that the University could discriminate based on viewpoint if demand for space exceeded its availability is wrong as well. The government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity. Had the meeting rooms in *Lamb's Chapel* been scarce, had the demand been greater than the supply, our decision would have been no different. It would have been incumbent on the State, of course, to ration or allocate the scarce resources on some acceptable neutral principle; but nothing in our decision indicated that scarcity would give the State the right to ****2520** exercise viewpoint discrimination that is otherwise impermissible.

Vital First Amendment speech principles are at stake here. The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. See *Healy v. James,* 408 U.S. 169, 180–181, 92 S.Ct. 2338, 2346, 33 L.Ed.2d 266 (1972); *Keyishian v. Board of Regents of* ***836** *Univ. of State of N.Y.,* 385 U.S. 589, 603, 87 S.Ct. 675, 683–684, 17 L.Ed.2d 629 (1967); *Sweezy v. New*

Hampshire, 354 U.S. 234, 250, 77 S.Ct. 1203, 1211–1212, 1 L.Ed.2d 1311 (1957). In ancient Athens, and, as Europe entered into a new period of intellectual awakening, in places like Bologna, Oxford, and Paris, universities began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn. See generally R. Palmer & J. Colton, A History of the Modern World 39 (7th ed. 1992). The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.

The Guideline invoked by the University to deny third-party contractor payments on behalf of WAP effects a sweeping restriction on student thought and student inquiry in the context of University sponsored publications. The prohibition on funding on behalf of publications that "primarily promot[e] or manifes[t] a particular belie[f] in or about a deity or an ultimate reality," in its ordinary and commonsense meaning, has a vast potential reach. The term "promotes" as used here would comprehend any writing advocating a philosophic position that rests upon a belief in a deity or ultimate reality. See Webster's Third New International Dictionary 1815 (1961) (defining "promote" as "to contribute to the growth, enlargement, or prosperity of: further, encourage"). And the term "manifests" would bring within the scope of the prohibition any writing that is explicable as resting upon a premise that presupposes the existence of a deity or ultimate reality. See *id.,* at 1375 (defining "manifest" as "to show plainly: make palpably evident or certain by showing or displaying"). Were the prohibition applied with much vigor at all, it would bar funding of essays by hypothetical student contributors named Plato, Spinoza, and Descartes. And if the regulation covers, as the University ***837** says it does, see Tr. of Oral Arg. 18–19, those student journalistic efforts that primarily manifest or promote a belief that there is no deity and no ultimate reality, then undergraduates named Karl Marx, Bertrand Russell, and Jean–Paul Sartre would likewise have some of their major essays excluded from student publications. If any manifestation of beliefs in first principles disqualifies the writing, as seems to be the case, it is indeed difficult to name renowned thinkers whose writings would be accepted, save perhaps for articles disclaiming all connection to their ultimate philosophy. Plato could contrive perhaps to submit an acceptable essay on making pasta or peanut butter cookies, provided he did not point out their (necessary) imperfections.

Based on the principles we have discussed, we hold that the regulation invoked to deny SAF support, both in its terms and in its application to these petitioners, is a denial of their right of free speech guaranteed by the First Amendment. It remains to be considered whether the violation following from the University's action is excused by the necessity of complying with the Constitution's prohibition against state establishment of religion. We turn to that question.

III

Before its brief on the merits in this Court, the University had argued at all stages of the litigation that inclusion of WAP's contractors in SAF funding authorization would violate the Establishment Clause. Indeed, that is ****2521** the ground on which the University prevailed in the Court of Appeals. We granted certiorari on this question: "Whether the Establishment Clause compels a state university to exclude an otherwise eligible student publication from participation in the student activities fund, solely on the basis of its religious viewpoint, where such exclusion would violate the Speech and Press Clauses if the viewpoint of the publication were nonreligious." Pet. for Cert. i. The University now seems to have abandoned this position, contending that "[t]he fundamental ***838** objection to petitioners' argument is not that it implicates the Establishment Clause but that it would defeat the ability of public education at all levels to control the use of public funds." Brief for Respondents 29; see *id.,* at 27–29, and n. 17; Tr. of Oral Arg. 14. That the University itself no longer presses the Establishment Clause claim is some indication that it lacks force; but as the Court of Appeals rested its judgment on the point and our dissenting colleagues would find it determinative, it must be addressed.

The Court of Appeals ruled that withholding SAF support from Wide Awake contravened the Speech Clause of the First Amendment, but proceeded to hold that the University's action was justified by the necessity of avoiding a violation of the Establishment Clause, an interest it found compelling. 18 F.3d, at 281. Recognizing

that this Court has regularly "sanctioned awards of direct nonmonetary benefits to religious groups where government has created open fora to which all similarly situated organizations are invited," *id.,* at 286 (citing *Widmar,* 454 U.S., at 277, 102 S.Ct., at 278), the Fourth Circuit asserted that direct monetary subsidization of religious organizations and projects is "a beast of an entirely different color," 18 F.3d, at 286. The court declared that the Establishment Clause would not permit the use of public funds to support " 'a specifically religious activity in an otherwise substantially secular setting.' " *Id.,* at 285 (quoting *Hunt v. McNair,* 413 U.S. 734, 743, 93 S.Ct. 2868, 2874, 37 L.Ed.2d 923 (1973) (emphasis deleted)). It reasoned that because Wide Awake is "a journal pervasively devoted to the discussion and advancement of an avowedly Christian theological and personal philosophy," the University's provision of SAF funds for its publication would "send an unmistakably clear signal that the University of Virginia supports Christian values and wishes to promote the wide promulgation of such values." 18 F.3d, at 286.

If there is to be assurance that the Establishment Clause retains its force in guarding against those governmental actions it was intended to prohibit, we must in each case inquire ***839** first into the purpose and object of the governmental action in question and then into the practical details of the program's operation. Before turning to these matters, however, we can set forth certain general principles that must bear upon our determination.

[12] A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion. We have decided a series of cases addressing the receipt of government benefits where religion or religious views are implicated in some degree. The first case in our modern Establishment Clause jurisprudence was *Everson v. Board of Ed. of Ewing,* 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947). There we cautioned that in enforcing the prohibition against laws respecting establishment of religion, we must "be sure that we do not inadvertently prohibit [the government] from extending its general state law benefits to all its citizens without regard to their religious belief." *Id.,* at 16, 67 S.Ct., at 512. We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse. See *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet,* 512 U.S. 687, 704, 114 S.Ct. 2481, 2491, 129 L.Ed.2d 546 (1994) (SOUTER, J.) ("[T]he principle is well grounded in our case law [and] we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges"); ****2522** *Witters v. Washington Dept. of Servs. for Blind,* 474 U.S. 481, 487–488, 106 S.Ct. 748, 751, 88 L.Ed.2d 846 (1986); *Mueller v. Allen,* 463 U.S. 388, 398–399, 103 S.Ct. 3062, 3069, 77 L.Ed.2d 721 (1983); *Widmar, supra,* 454 U.S., at 274–275, 102 S.Ct., at 277. More than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design. See *Lamb's Chapel,* 508 U.S., at 393–394, 113 S.Ct., at 2147–2148; *Mergens,* 496 U.S., at 248, 252, 110 S.Ct., at 2370–2371, 2373; *Widmar, supra,* at 274–275, 102 S.Ct., at 277.

[13] ***840** The governmental program here is neutral toward religion. There is no suggestion that the University created it to advance religion or adopted some ingenious device with the purpose of aiding a religious cause. The object of the SAF is to open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life. The University's SAF Guidelines have a separate classification for, and do not make third-party payments on behalf of, "religious organizations," which are those "whose purpose is to practice a devotion to an acknowledged ultimate reality or deity." Pet. for Cert. 66a. The category of support here is for "student news, information, opinion, entertainment, or academic communications media groups," of which Wide Awake was 1 of 15 in the 1990 school year. WAP did not seek a subsidy because of its Christian editorial viewpoint; it sought funding as a student journal, which it was.

The neutrality of the program distinguishes the student fees from a tax levied for the direct support of a church or group of churches. A tax of that sort, of course, would run contrary to Establishment Clause concerns dating from the earliest days of the Republic. The apprehensions of our predecessors involved the levying of taxes upon the public for the sole and exclusive purpose of establishing and supporting specific sects. The exaction here, by contrast, is a student activity fee designed to reflect the reality

that student life in its many dimensions includes the necessity of wide-ranging speech and inquiry and that student expression is an integral part of the University's educational mission. The fee is mandatory, and we do not have before us the question whether an objecting student has the First Amendment right to demand a pro rata return to the extent the fee is expended for speech to which he or she does not subscribe. See *Keller v. State Bar of Cal.,* 496 U.S. 1, 15–16, 110 S.Ct. 2228, 2237, 110 L.Ed.2d 1 (1990); *Abood v. Detroit Bd. of Ed.,* 431 U.S. 209, 235–236, 97 S.Ct. 1782, 1800, 52 L.Ed.2d 261 (1977). We must treat it, then, as an exaction upon the students. ***841** But the $14 paid each semester by the students is not a general tax designed to raise revenue for the University. See *United States v. Butler,* 297 U.S. 1, 61, 56 S.Ct. 312, 317, 80 L.Ed. 477 (1936) ("A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government"); see also *Head Money Cases,* 112 U.S. 580, 595–596, 5 S.Ct. 247, 252, 28 L.Ed. 798 (1884). The SAF cannot be used for unlimited purposes, much less the illegitimate purpose of supporting one religion. Much like the arrangement in *Widmar,* the money goes to a special fund from which any group of students with CIO status can draw for purposes consistent with the University's educational mission; and to the extent the student is interested in speech, withdrawal is permitted to cover the whole spectrum of speech, whether it manifests a religious view, an antireligious view, or neither. Our decision, then, cannot be read as addressing an expenditure from a general tax fund. Here, the disbursements from the fund go to private contractors for the cost of printing that which is protected under the Speech Clause of the First Amendment. This is a far cry from a general public assessment designed and effected to provide financial support for a church.

Government neutrality is apparent in the State's overall scheme in a further meaningful respect. The program respects the critical difference "between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." ****2523** *Mergens, supra,* at 250, 110 S.Ct., at 2372 (opinion of O'CONNOR, J.). In this case, "the government has not fostered or encouraged" any mistaken impression that the student newspapers speak for the University. *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 766, 115 S.Ct. 2440, 2448, 132 L.Ed.2d 650. The University has taken pains to disassociate itself from the private speech involved in this case. The Court of Appeals' apparent concern that Wide Awake's religious orientation would be attributed to the University is not a plausible fear, and there is no real likelihood that the ***842** speech in question is being either endorsed or coerced by the State, see *Lee v. Weisman,* 505 U.S. 577, 587, 112 S.Ct. 2649, 2655, 120 L.Ed.2d 467 (1992); *Witters, supra,* at 489, 106 S.Ct., at 752–753 (citing *Lynch v. Donnelly,* 465 U.S. 668, 688, 104 S.Ct. 1355, 1367, 79 L.Ed.2d 604 (1984) (O'CONNOR, J., concurring)); see also *Witters, supra,* at 493, 106 S.Ct., at 754–755 (O'CONNOR, J., concurring in part and concurring in judgment) (citing *Lynch, supra,* at 690, 104 S.Ct., at 1368 (O'CONNOR, J., concurring)).

The Court of Appeals (and the dissent) are correct to extract from our decisions the principle that we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions, citing *Roemer v. Board of Public Works of Md.,* 426 U.S. 736, 747, 96 S.Ct. 2337, 2345, 49 L.Ed.2d 179 (1976); *Bowen v. Kendrick,* 487 U.S. 589, 614–615, 108 S.Ct. 2562, 2577, 101 L.Ed.2d 520 (1988); *Hunt v. McNair,* 413 U.S., at 742, 93 S.Ct. at 2874; *Tilton v. Richardson,* 403 U.S. 672, 679–680, 91 S.Ct. 2091, 2096, 29 L.Ed.2d 790 (1971); *Board of Ed. of Central School Dist. No. 1 v. Allen,* 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968). The error is not in identifying the principle, but in believing that it controls this case. Even assuming that WAP is no different from a church and that its speech is the same as the religious exercises conducted in *Widmar* (two points much in doubt), the Court of Appeals decided a case that was, in essence, not before it, and the dissent would have us do the same. We do not confront a case where, even under a neutral program that includes nonsectarian recipients, the government is making direct money payments to an institution or group that is engaged in religious activity. Neither the Court of Appeals nor the dissent, we believe, takes sufficient cognizance of the undisputed fact that no public funds flow directly to WAP's coffers.

[14] It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for sectarian activities, accompanied by some devotional exercises. See *Widmar,* 454 U.S., at 269, 102 S.Ct., at 274; *Mergens,* 496 U.S., at 252, 110 S.Ct., at 2373. This is so even where the upkeep, maintenance, and repair of the

facilities ***843** attributed to those uses are paid from a student activities fund to which students are required to contribute. *Widmar, supra,* at 265, 102 S.Ct., at 272. The government usually acts by spending money. Even the provision of a meeting room, as in *Mergens* and *Widmar,* involved governmental expenditure, if only in the form of electricity and heating or cooling costs. The error made by the Court of Appeals, as well as by the dissent, lies in focusing on the money that is undoubtedly expended by the government, rather than on the nature of the benefit received by the recipient. If the expenditure of governmental funds is prohibited whenever those funds pay for a service that is, pursuant to a religion-neutral program, used by a group for sectarian purposes, then *Widmar, Mergens,* and *Lamb's Chapel* would have to be overruled. Given our holdings in these cases, it follows that a public university may maintain its own computer facility and give student groups access to that facility, including the use of the printers, on a religion neutral, say first-come-first-served, basis. If a religious student organization obtained access on that religion-neutral basis and used a computer to compose or a printer or copy machine to print speech with a religious content or viewpoint, the State's action in providing the group with access would no more violate the Establishment Clause than would giving those groups access to an assembly hall. See ****2524** *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993); *Widmar, supra; Mergens, supra.* There is no difference in logic or principle, and no difference of constitutional significance, between a school using its funds to operate a facility to which students have access, and a school paying a third-party contractor to operate the facility on its behalf. The latter occurs here. The University provides printing services to a broad spectrum of student newspapers qualified as CIO's by reason of their officers and membership. Any benefit to religion is incidental to the government's provision of secular services for secular ***844** purposes on a religion-neutral basis. Printing is a routine, secular, and recurring attribute of student life.

By paying outside printers, the University in fact attains a further degree of separation from the student publication, for it avoids the duties of supervision, escapes the costs of upkeep, repair, and replacement attributable to student use, and has a clear record of costs. As a result, and as in *Widmar,* the University can charge the SAF, and not the taxpayers as a whole, for the discrete activity in question. It would be formalistic for us to say that the University must forfeit these advantages and provide the services itself in order to comply with the Establishment Clause. It is, of course, true that if the State pays a church's bills it is subsidizing it, and we must guard against this abuse. That is not a danger here, based on the considerations we have advanced and for the additional reason that the student publication is not a religious institution, at least in the usual sense of that term as used in our case law, and it is not a religious organization as used in the University's own regulations. It is instead a publication involved in a pure forum for the expression of ideas, ideas that would be both incomplete and chilled were the Constitution to be interpreted to require that state officials and courts scan the publication to ferret out views that principally manifest a belief in a divine being.

Were the dissent's view to become law, it would require the University, in order to avoid a constitutional violation, to scrutinize the content of student speech, lest the expression in question—speech otherwise protected by the Constitution—contain too great a religious content. The dissent, in fact, anticipates such censorship as "crucial" in distinguishing between "works characterized by the evangelism of Wide Awake and writing that merely happens to express views that a given religion might approve." *Post,* at 2550. That eventuality raises the specter of governmental censorship, to ensure that all student writings and publications meet some baseline standard of secular orthodoxy. To impose that ***845** standard on student speech at a university is to imperil the very sources of free speech and expression. As we recognized in *Widmar,* official censorship would be far more inconsistent with the Establishment Clause's dictates than would governmental provision of secular printing services on a religion-blind basis.

> "[T]he dissent fails to establish that the distinction [between 'religious' speech and speech 'about' religion] has intelligible content. There is no indication when 'singing hymns, reading scripture, and teaching biblical principles' cease to be 'singing, teaching, and reading'—all apparently forms of 'speech,' despite their religious subject matter—and become unprotected 'worship.' ...
>
> "[E]ven if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer. Merely to draw the distinction would require the university—and ultimately the courts—to inquire into the significance of words and practices to different religious faiths, and in

varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases. *E.g., Walz v. Tax Comm'n of City of New York,* 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970)]." 454 U.S., at 269–270, n. 6, 102 S.Ct., at 274, n. 6 (citations omitted).

* * *

To obey the Establishment Clause, it was not necessary for the University to deny eligibility to student publications because of their viewpoint. The neutrality commanded of the State by the separate Clauses of the First Amendment was compromised by the ****2525** University's course of action. The viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk ***846** fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires. There is no Establishment Clause violation in the University's honoring its duties under the Free Speech Clause.

The judgment of the Court of Appeals must be, and is, reversed.

It is so ordered.

Justice O'CONNOR, concurring.

"We have time and again held that the government generally may not treat people differently based on the God or gods they worship, or do not worship." *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet,* 512 U.S. 687, 714, 114 S.Ct. 2481, 2497, 129 L.Ed.2d 546 (1994) (O'CONNOR, J., concurring in part and concurring in judgment). This insistence on government neutrality toward religion explains why we have held that schools may not discriminate against religious groups by denying them equal access to facilities that the schools make available to all. See *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993); *Widmar v. Vincent,* 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981). Withholding access would leave an impermissible perception that religious activities are disfavored: "[T]he message is one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens,* 496 U.S. 226, 248, 110 S.Ct. 2356, 2371, 110 L.Ed.2d 191 (1990) (plurality opinion). "The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating *against* religion." *Kiryas Joel, supra,* at 717, 114 S.Ct., at 2498 (O'CONNOR, J.). Neutrality, in both form and effect, is one hallmark of the Establishment Clause.

As Justice SOUTER demonstrates, however, *post,* at 2535–2537, there exists another axiom in the history and precedent of the Establishment Clause. "Public ***847** funds may not be used to endorse the religious message." *Bowen v. Kendrick,* 487 U.S. 589, 642, 108 S.Ct. 2562, 2592, 101 L.Ed.2d 520 (1988) (Blackmun, J., dissenting); see also *id.,* at 622, 108 S.Ct., at 2581 (O'CONNOR, J., concurring). Our cases have permitted some government funding of secular functions performed by sectarian organizations. See, *e.g., id.,* at 617, 108 S.Ct. at 2578 (funding for sex education); *Roemer v. Board of Public Works of Md.,* 426 U.S. 736, 741, 96 S.Ct. 2337, 2342, 49 L.Ed.2d 179 (1976) (cash grant to colleges not to be used for "sectarian purposes"); *Bradfield v. Roberts,* 175 U.S. 291, 299–300, 20 S.Ct. 121, 124, 44 L.Ed. 168 (1899) (funding of health care for indigent patients). These decisions, however, provide no precedent for the use of public funds to finance religious activities.

This case lies at the intersection of the principle of government neutrality and the prohibition on state funding of religious activities. It is clear that the University has established a generally applicable program to encourage the free exchange of ideas by its students, an expressive marketplace that includes some 15 student publications with predictably divergent viewpoints. It is equally clear that petitioners' viewpoint is religious and that publication of Wide Awake is a religious activity, under both the University's regulation and a fair reading of our precedents. Not to finance Wide Awake, according to petitioners, violates the principle of neutrality by sending a message of hostility toward religion. To finance Wide Awake, argues the University, violates the prohibition on direct state funding of religious activities.

When two bedrock principles so conflict, understandably neither can provide the definitive answer. Reliance on categorical platitudes is unavailing. Resolution instead depends on the hard task of judging—sifting through the details and determining whether ****2526** the challenged program offends the Establishment Clause. Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case. See *Lee v. Weisman,* 505 U.S. 577, 598, 112 S.Ct. 2649, 2661, 120 L.Ed.2d 467 (1992) ("Our jurisprudence in this area is of necessity one of line-drawing"). As Justice Holmes observed in a different ***848** context: "Neither are we troubled by the question where to draw the line. That is the question in pretty much everything worth arguing in the law. Day and night, youth and age are only types." *Irwin v. Gavit,* 268 U.S. 161, 168, 45 S.Ct. 475, 476, 69 L.Ed. 897 (1925) (citation omitted).

In *Witters v. Washington Dept. of Servs. for Blind,* 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986), for example, we unanimously held that the State may, through a generally applicable financial aid program, pay a blind student's tuition at a sectarian theological institution. The Court so held, however, only after emphasizing that "vocational assistance provided under the Washington program is paid directly to the student, who transmits it to the educational institution of his or her choice." *Id.,* at 487, 106 S.Ct., at 751. The benefit to religion under the program, therefore, is akin to a public servant contributing her government paycheck to the church. *Ibid.* We thus resolved the conflict between the neutrality principle and the funding prohibition, not by permitting one to trump the other, but by relying on the elements of choice peculiar to the facts of that case: "The aid to religion at issue here is the result of petitioner's private choice. No reasonable observer is likely to draw from the facts before us an inference that the State itself is endorsing a religious practice or belief." *Id.,* at 493, 106 S.Ct., at 755 (O'CONNOR, J., concurring in part and concurring in judgment). See also *Zobrest v. Catalina Foothills School Dist.,* 509 U.S. 1, 10–11, 113 S.Ct. 2462, 2467–2468, 125 L.Ed.2d 1 (1993).

The need for careful judgment and fine distinctions presents itself even in extreme cases. *Everson v. Board of Ed. of Ewing,* 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947), provided perhaps the strongest exposition of the no-funding principle: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Id.,* at 16, 67 S.Ct., at 512. Yet the Court approved the use of public funds, in a general program, to reimburse parents for their children's bus fares to attend Catholic schools. *Id.,* at 17–18, 67 S.Ct., at 512–513. ***849** Although some would cynically dismiss the Court's disposition as inconsistent with its protestations, see *id.,* at 19, 67 S.Ct., at 513 (Jackson, J., dissenting) ("[T]he most fitting precedent is that of Julia who, according to Byron's reports, 'whispering "I will ne'er consent,"—consented' "), the decision reflected the need to rely on careful judgment—not simple categories—when two principles, of equal historical and jurisprudential pedigree, come into unavoidable conflict.

So it is in this case. The nature of the dispute does not admit of categorical answers, nor should any be inferred from the Court's decision today, see *ante,* at 2521. Instead, certain considerations specific to the program at issue lead me to conclude that by providing the same assistance to Wide Awake that it does to other publications, the University would not be endorsing the magazine's religious perspective.

First, the student organizations, at the University's insistence, remain strictly independent of the University. The University's agreement with the Contracted Independent Organizations (CIO)—*i.e.,* student groups—provides:

> "The University is a Virginia public corporation and the CIO is not part of that corporation, but rather exists and operates independently of the University....
>
> "The parties understand and agree that this Agreement is the only source of any control the University may have over the CIO or its activities...." App. 27.

And the agreement requires that student organizations include in every letter, contract, publication, or other written materials the following disclaimer:

> ****2527** "Although this organization has members who are University of Virginia students (faculty) (employees), the organization is independent of the corporation which is the University and which is not responsible for the organization's contracts, acts or omissions." *Id.,* at 28.

***850** Any reader of Wide Awake would be on notice of the publication's independence from the University. Cf. *Widmar v. Vincent,* 454 U.S., at 274, n. 14, 102 S.Ct., at 276, n. 14.

Second, financial assistance is distributed in a manner that ensures its use only for permissible purposes. A student organization seeking assistance must submit disbursement requests; if approved, the funds are paid directly to the third-party vendor and do not pass through the organization's coffers. This safeguard accompanying the University's financial assistance, when provided to a publication with a religious viewpoint such as Wide Awake, ensures that the funds are used only to further the University's purpose in maintaining a free and robust marketplace of ideas, from whatever perspective. This feature also makes this case analogous to a school providing equal access to a generally available printing press (or other physical facilities), *ante,* at 2524, and unlike a block grant to religious organizations.

Third, assistance is provided to the religious publication in a context that makes improbable any perception of government endorsement of the religious message. Wide Awake does not exist in a vacuum. It competes with 15 other magazines and newspapers for advertising and readership. The widely divergent viewpoints of these many purveyors of opinion, all supported on an equal basis by the University, significantly diminishes the danger that the message of any one publication is perceived as endorsed by the University. Besides the general news publications, for example, the University has provided support to The Yellow Journal, a humor magazine that has targeted Christianity as a subject of satire, and Al–Salam, a publication to "promote a better understanding of Islam to the University Community," App. 92. Given this wide array of nonreligious, antireligious and competing religious viewpoints in the forum supported by the University, any perception that the University endorses one particular viewpoint would be illogical. This is not the harder case where religious speech threatens ***851** to dominate the forum. Cf. *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S., at 777, 115 S.Ct., at 2451 (O'CONNOR, J., concurring in part and concurring in judgment); *Mergens,* 496 U.S., at 275, 110 S.Ct., at 2385.

Finally, although the question is not presented here, I note the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees. See, *e.g., Keller v. State Bar of Cal.,* 496 U.S. 1, 15, 110 S.Ct. 2228, 2236–2237, 110 L.Ed.2d 1 (1990); *Abood v. Detroit Bd. of Ed.,* 431 U.S. 209, 236, 97 S.Ct. 1782, 1800, 52 L.Ed.2d 261 (1977). There currently exists a split in the lower courts as to whether such a challenge would be successful. Compare *Hays County Guardian v. Supple,* 969 F.2d 111, 123 (CA5 1992), cert. denied, 506 U.S. 1087, 113 S.Ct. 1067, 122 L.Ed.2d 371 (1993); *Kania v. Fordham,* 702 F.2d 475, 480 (CA4 1983); *Good v. Associated Students of Univ. of Wash.,* 86 Wash.2d 94, 105–106, 542 P.2d 762, 769 (1975) (en banc), with *Smith v. Regents of Univ. of Cal.,* 4 Cal.4th 843, 863–864, 16 Cal.Rptr.2d 181, 194–195, 844 P.2d 500, 513–514, cert. denied, 510 U.S. 863, 114 S.Ct. 181, 126 L.Ed.2d 140 (1993). While the Court does not resolve the question here, see *ante,* at 2522, the existence of such an opt-out possibility not available to citizens generally, see *Abood, supra,* at 259, n. 13, 97 S.Ct., at 1811, n. 13 (Powell, J., concurring in judgment), provides a potential basis for distinguishing proceeds of the student fees in this case from proceeds of the general assessments in support of religion that lie at the core of the prohibition against religious funding, see *ante,* at 2522–2523; *post,* at 2528–2529 (THOMAS, J., concurring); *post,* at 2535–2537 (SOUTER, J., dissenting), and from government funds generally. Unlike moneys dispensed from state or federal treasuries, the Student Activities Fund is collected from students who themselves administer the fund and select qualifying recipients only ****2528** from among those who originally paid the fee. The government neither pays into nor draws from this common pool, and a fee of this sort appears conducive to granting individual students proportional refunds. The Student Activities Fund, then, represents not government resources, ***852** whether derived from tax revenue, sales of assets, or otherwise, but a fund that simply belongs to the students.

The Court's decision today therefore neither trumpets the supremacy of the neutrality principle nor signals the demise of the funding prohibition in Establishment Clause jurisprudence. As I observed last Term, "[e]xperience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test." *Kiryas Joel,* 512 U.S., at 720, 114 S.Ct., at 2499 (opinion concurring in part and concurring in judgment). When bedrock principles collide, they test the limits of categorical obstinacy and expose the flaws and dangers of a Grand Unified Theory that may turn out to be

neither grand nor unified. The Court today does only what courts must do in many Establishment Clause cases —focus on specific features of a particular government action to ensure that it does not violate the Constitution. By withholding from Wide Awake assistance that the University provides generally to all other student publications, the University has discriminated on the basis of the magazine's religious viewpoint in violation of the Free Speech Clause. And particular features of the University's program—such as the explicit disclaimer, the disbursement of funds directly to third-party vendors, the vigorous nature of the forum at issue, and the possibility for objecting students to opt out—convince me that providing such assistance in this case would not carry the danger of impermissible use of public funds to endorse Wide Awake's religious message.

Subject to these comments, I join the opinion of the Court.

Justice THOMAS, concurring.

I agree with the Court's opinion and join it in full, but I write separately to express my disagreement with the historical analysis put forward by the dissent. Although the dissent starts down the right path in consulting the original meaning of the Establishment Clause, its misleading application of history yields a principle that is inconsistent with our Nation's long tradition of allowing religious adherents ***853** to participate on equal terms in neutral government programs.

Even assuming that the Virginia debate on the so-called "Assessment Controversy" was indicative of the principles embodied in the Establishment Clause, this incident hardly compels the dissent's conclusion that government must actively discriminate against religion. The dissent's historical discussion glosses over the fundamental characteristic of the Virginia assessment bill that sparked the controversy: The assessment was to be imposed for the support of clergy in the performance of their function of teaching religion. Thus, the "Bill Establishing a Provision for Teachers of the Christian Religion" provided for the collection of a specific tax, the proceeds of which were to be appropriated "by the Vestries, Elders, or Directors of each religious society ... to a provision for a Minister or Teacher of the Gospel of their denomination, or the providing places of divine worship, and to none other use whatsoever." See *Everson v. Board of Ed. of Ewing,* 330 U.S. 1, 74, 67 S.Ct. 504, 539, 91 L.Ed. 711 (1947) (appendix to dissent of Rutledge, J.). [1]

1 The dissent suggests that the assessment bill would have created a "generally available subsidy program" comparable to respondents' Student Activities Fund (SAF). See *post,* at 2536, n. 1. The dissent's characterization of the bill, however, is squarely at odds with the bill's clear purpose and effect to provide "for the support of Christian teachers." *Everson,* 330 U.S., at 72, 67 S.Ct., at 539. Moreover, the section of the bill cited by the dissent, see *post,* at 2536, n. 1, simply indicated that funds would be "disposed of under the direction of the General Assembly, for the encouragement of seminaries of learning within the Counties whence such sums shall arise," *Everson, supra,* at 74, 67 S.Ct., at 540. This provision disposing of undesignated funds hardly transformed the "Bill Establishing a Provision for Teachers of the Christian Religion" into a truly neutral program that would benefit religious adherents as part of a large class of beneficiaries defined without reference to religion. Indeed, the only appropriation of money made by the bill would have been to promote "the general diffusion of Christian knowledge," 330 U.S., at 72, 67 S.Ct., at 539; any possible appropriation for "seminaries of learning" depended entirely on future legislative action.

Even assuming that future legislators would adhere to the bill's directive in appropriating the undesignated tax revenues, nothing in the bill would prevent use of those funds solely for sectarian educational institutions. To the contrary, most schools at the time of the founding were affiliated with some religious organization, see C. Antieau, A. Downey, & E. Roberts, Freedom From Federal Establishment, Formation and Early History of the First Amendment Religion Clauses 163 (1964), and in fact there was no system of public education in Virginia until several decades after the assessment bill was proposed, see A. Morrison, The Beginnings of Public Education in Virginia, 1776–1860, p. 9 (1917); see also A. Johnson, The Legal Status of Church–State Relationships in the United States 4 (1982) ("In Virginia the parish institutions transported from England were the earliest educational agencies. Although much of the teaching took place in the home and with the aid of tutors, every minister had a school, and it was the duty of the vestry to see that all the poor children were taught to read and write") (footnote omitted). Further, the clearly religious tenor of

> the Virginia assessment would seem to point toward appropriation of residual funds to sectarian "seminaries of learning." Finally, although modern historians have focused on the opt-out provision, the dissent provides no indication that Madison viewed the Virginia assessment as an evenhanded program; in fact, several of the objections expressed in Madison's Memorial and Remonstrance Against Religious Assessments, reprinted in *Everson, supra,* at 63, 67 S.Ct., at 534–535, focus clearly on the bill's violation of the principle of "equality," or evenhandedness. See *infra,* at 2529–2530.

****2529** ***854** James Madison's Memorial and Remonstrance Against Religious Assessments (hereinafter Madison's Remonstrance) must be understood in this context. Contrary to the dissent's suggestion, Madison's objection to the assessment bill did not rest on the premise that religious entities may never participate on equal terms in neutral government programs. Nor did Madison embrace the argument that forms the linchpin of the dissent: that monetary subsidies are constitutionally different from other neutral benefits programs. Instead, Madison's comments are more consistent with the neutrality principle that the dissent inexplicably discards. According to Madison, the Virginia assessment was flawed because it "violate[d] that equality which ought to be the basis of every law." Madison's Remonstrance ¶ 4, reprinted in *Everson, supra,* at 66, 67 S.Ct., at 536 (appendix to dissent of Rutledge, J.). The assessment violated the "equality" principle not because ***855** it allowed religious groups to participate in a generally available government program, but because the bill singled out religious entities for special benefits. See *ibid.* (arguing that the assessment violated the equality principle "by subjecting some to peculiar burdens" and "by granting to others peculiar exemptions").

Legal commentators have disagreed about the historical lesson to take from the Assessment Controversy. For some, the experience in Virginia is consistent with the view that the Framers saw the Establishment Clause simply as a prohibition on governmental preferences for some religious faiths over others. See R. Cord, Separation of Church and State: Historical Fact and Current Fiction 20–23 (1982); Smith, Getting Off on the Wrong Foot and Back on Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the *Reynolds* and *Everson* Decisions, 20 Wake Forest L.Rev. 569, 590–591 (1984). Other commentators have rejected this view, concluding that the Establishment Clause forbids not only government preferences for some religious sects over others, but also government preferences for religion over irreligion. See, *e.g.,* Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 Wm. & Mary L.Rev. 875 (1986).

I find much to commend the former view. Madison's focus on the preferential nature of the assessment was not restricted to the fourth paragraph of the Remonstrance discussed above. The funding provided by the Virginia assessment was to be extended only to Christian sects, and the Remonstrance seized on this defect:

> "Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects." Madison's Remonstrance ¶ 3, reprinted in *Everson, supra,* at 65, 67 S.Ct., at 535–536.

***856** In addition to the third and fourth paragraphs of the Remonstrance, "Madison's seventh, ****2530** ninth, eleventh, and twelfth arguments all speak, in some way, to the same intolerance, bigotry, unenlightenment, and persecution that had generally resulted from previous exclusive religious establishments." Cord, *supra,* at 21. The conclusion that Madison saw the principle of nonestablishment as barring governmental preferences for *particular* religious faiths seems especially clear in light of statements he made in the more relevant context of the House debates on the First Amendment. See *Wallace v. Jaffree,* 472 U.S. 38, 98, 105 S.Ct. 2479, 2511, 86 L.Ed.2d 29 (1985) (REHNQUIST, J., dissenting) (Madison's views "as reflected by actions on the floor of the House in 1789, [indicate] that he saw the [First] Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects," but not "as requiring neutrality on the part of government between religion and irreligion"). Moreover, even if more extreme notions of the separation of church and state can be attributed to Madison, many of them clearly stem from "arguments reflecting the concepts of natural law, natural rights, and the social contract between government and a civil society," Cord, *supra,* at 22, rather than the principle of nonestablishment in the Constitution. In any event, the views of one man do not establish the original understanding of the First Amendment.

But resolution of this debate is not necessary to decide this case. Under any understanding of the Assessment Controversy, the history cited by the dissent cannot support the conclusion that the Establishment Clause "categorically condemn[s] state programs directly aiding religious activity" when that aid is part of a neutral program available to a wide array of beneficiaries. *Post,* at 2539. Even if Madison believed that the principle of nonestablishment of religion precluded government financial support for religion *per se* (in the sense of government benefits specifically targeting religion), there is no indication that at the time of the framing ***857** he took the dissent's extreme view that the government must discriminate against religious adherents by excluding them from more generally available financial subsidies. [2]

2 To the contrary, Madison's Remonstrance decried the fact that the assessment bill would require civil society to take "cognizance" of religion. Madison's Remonstrance ¶ 1, reprinted in *Everson v. Board of Ed. of Ewing,* 330 U.S. 1, 64, 67 S.Ct. 504, 535, 91 L.Ed. 711 (1947). Respondents' exclusion of religious activities from SAF funding creates this very problem. It requires University officials to classify publications as "religious activities," and to discriminate against the publications that fall into that category. Such a policy also contravenes the principles expressed in Madison's Remonstrance by encouraging religious adherents to cleanse their speech of religious overtones, thus "degrad[ing] from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority." Madison's Remonstrance ¶ 9, reprinted in *Everson, supra,* at 69, 67 S.Ct., at 537.

In fact, Madison's own early legislative proposals cut against the dissent's suggestion. In 1776, when Virginia's Revolutionary Convention was drafting its Declaration of Rights, Madison prepared an amendment that would have disestablished the Anglican Church. This amendment (which went too far for the Convention and was not adopted) is not nearly as sweeping as the dissent's version of disestablishment; Madison merely wanted the Convention to declare that "no man or class of men ought, on account of religion[,] to be invested with *peculiar* emoluments or privileges...." Madison's Amendments to the Declaration of Rights (May 29–June 12, 1776), in 1 Papers of James Madison 174 (W. Hutchinson & W. Rachal eds. 1962) (emphasis added). Likewise, Madison's Remonstrance stressed that "just government" is "best supported by protecting every citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another." Madison's Remonstrance ¶ 8, reprinted in *Everson,* 330 U.S., at 68, 67 S.Ct., at 537; cf. *Terrett v. Taylor,* 9 Cranch 43, 49, 3 L.Ed. 650 (1815) (holding that the Virginia Constitution did not prevent the government from "aiding ... the votaries of ***858** every sect to perform their own religious duties," or from "establishing funds for the support of ministers, for public charities, for the endowment of churches, or for the sepulture of the dead").

****2531** Stripped of its flawed historical premise, the dissent's argument is reduced to the claim that our Establishment Clause jurisprudence permits neutrality in the context of access to government *facilities* but requires discrimination in access to government *funds.* The dissent purports to locate the prohibition against "direct public funding" at the "heart" of the Establishment Clause, see *post,* at 2541, but this conclusion fails to confront historical examples of funding that date back to the time of the founding. To take but one famous example, both Houses of the First Congress elected chaplains, see S. Jour., 1st Cong., 1st Sess., 10 (1820 ed.); H.R. Jour., 1st Cong., 1st Sess., 26 (1826 ed.), and that Congress enacted legislation providing for an annual salary of $500 to be paid out of the Treasury, see Act of Sept. 22, 1789, ch. 17, § 4, 1 Stat. 70, 71. Madison himself was a member of the committee that recommended the chaplain system in the House. See H.R. Jour., at 11–12; 1 Annals of Cong. 891 (1789); Cord, Separation of Church and State: Historical Current Fiction, at 25. This same system of "direct public funding" of congressional chaplains has "continued without interruption ever since that early session of Congress." *Marsh v. Chambers,* 463 U.S. 783, 788, 103 S.Ct. 3330, 3334, 77 L.Ed.2d 1019 (1983). [3]

3 A number of other, less familiar examples of what amount to direct funding appear in early Acts of Congress. See, *e.g.,* Act of Feb. 20, 1833, ch. 42, 4 Stat. 618–619 (authorizing the State of Ohio to sell "all or any part of the lands heretofore reserved and appropriated by Congress for the support of religion within the Ohio Company's ... purchases ... and to invest the money arising from the sale thereof, in some productive fund; the proceeds of which shall be for ever annually applied ... for the support of religion within the several townships for which said lands were originally reserved and set apart, and for no other use or purpose whatsoever"); Act of

Mar. 2, 1833, ch. 86, §§ 1, 3, 6 Stat. 538 (granting to Georgetown College—a Jesuit institution—"lots in the city of Washington, to the amount, in value, of twenty-five thousand dollars," and directing the College to sell the lots and invest the proceeds, thereafter using the dividends to establish and endow such professorships as it saw fit); see also *Wallace v. Jaffree,* 472 U.S. 38, 103, 105 S.Ct. 2479, 2514, 86 L.Ed.2d 29 (1985) (REHNQUIST, J., dissenting) ("As the United States moved from the 18th into the 19th century, Congress appropriated time and again public moneys in support of sectarian Indian education carried on by religious organizations").

***859** The historical evidence of government support for religious entities through property tax exemptions is also overwhelming. As the dissent concedes, property tax exemptions for religious bodies "have been in place for over 200 years without disruption to the interests represented by the Establishment Clause." *Post,* at 2542, n. 7 (citing *Walz v. Tax Comm'n of City of New York,* 397 U.S. 664, 676–680, 90 S.Ct. 1409, 1415–1417, 25 L.Ed.2d 697 (1970)).[4] In my view, the dissent's acceptance of this tradition puts to rest the notion that the Establishment Clause bars monetary aid to religious groups even when the aid is equally available to other groups. A tax exemption in many cases is economically and functionally indistinguishable from a direct monetary subsidy.[5] In ****2532** one instance, the government relieves religious ***860** entities (along with others) of a generally applicable tax; in the other, it relieves religious entities (along with others) of some or all of the burden of that tax by returning it in the form of a cash subsidy. Whether the benefit is provided at the front or back end of the taxation process, the financial aid to religious groups is undeniable. The analysis under the Establishment Clause must also be the same: "Few concepts are more deeply embedded in the fabric of our national ***861** life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise...." *Walz, supra,* at 676–677, 90 S.Ct., at 1415.

4 The Virginia experience during the period of the Assessment Controversy itself is inconsistent with the rigid "no-aid" principle embraced by the dissent. Since at least 1777, the Virginia Legislature authorized tax exemptions for property belonging to the "commonwealth, or to any county, town, college, houses for divine worship, or seminary of learning." Act of Jan. 23, 1800, ch. 2, § 1, 1800 Va.Acts. And even Thomas Jefferson, respondents' founder and a champion of disestablishment in Virginia, advocated the use of public funds in Virginia for a department of theology in conjunction with other professional schools. See S. Padover, The Complete Jefferson 1067 (1943); see also *id.,* at 958 (noting that Jefferson advocated giving "to the sectarian schools of divinity the full benefit [of] the public provisions made for instruction in the other branches of science").

5 In the tax literature, this identity is called a "tax expenditure," a concept "based upon recognition of the fact that a government can appropriate money to a particular person or group by using a special, narrowly directed tax deduction or exclusion, instead of by using its ordinary direct spending mechanisms. For example, a government with a general income tax, wanting to add $7,000 to the spendable income of a preacher whose top tax rate is 30%, has two ways of subsidizing him. The government can send the preacher a check for $10,000 and tax him on all of his income, or it can authorize him to reduce his taxable income by $23,333.33 [resulting in a tax saving of $7,000]. If the direct payment were itself taxable and did not alter his tax bracket, the preacher would receive the same benefit from the tax deduction as he would from the direct payment." Wolfman, Tax Expenditures: From Idea to Ideology, 99 Harv.L.Rev. 491, 491–492 (1985). In fact, Congress has provided a similar "tax expenditure" in § 107 of the Internal Revenue Code by granting a " 'minister of the gospel' " an unlimited exclusion for the rental value of any home furnished as part of his pay or for the rental allowance paid to him. See *id.,* at 492, n. 6.

Although Professor Bittker is certainly a leading scholar in the tax field, the dissent's reliance on Bittker, see *post,* at 2542, n. 7, is misplaced in this context. See Adler, The Internal Revenue Code, The Constitution, and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making, 28 Wake Forest L.Rev. 855, 862, n. 30 (1993):

> "Early criticism of the tax expenditure concept focused on the difficulty of drawing a dividing line between what is or is not a special provision. Professor Boris Bittker, for example, argued that since no tax is all inclusive, exemptions from any tax could not be described as the equivalent of subsidies.

> Boris I. Bittker, *Churches, Taxes and the Constitution,* 78 Yale L.J. 1285 (1969). This wholesale rejection of tax expenditure analysis was short-lived and attracted few supporters. Rather, the large body of literature about tax expenditures accepts the basic concept that special exemptions from tax function as subsidies. The current debate focuses on whether particular items are correctly identified as tax expenditures and whether incentive provisions are more efficient when structured as tax expenditures rather than direct spending programs. *See generally* [numerous authorities]."

Consistent application of the dissent's "no-aid" principle would require that " 'a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.' " *Zobrest v. Catalina Foothills School Dist.,* 509 U.S. 1, 8, 113 S.Ct. 2462, 2466, 125 L.Ed.2d 1 (1993) (quoting *Widmar v. Vincent,* 454 U.S. 263, 274–275, 102 S.Ct. 269, 277, 70 L.Ed.2d 440 (1981)). The dissent admits that "evenhandedness may become important to ensuring that religious interests are not inhibited." *Post,* at 2541, n. 5. Surely the dissent must concede, however, that the same result should obtain whether the government provides the populace with fire protection by reimbursing the costs of smoke detectors and overhead sprinkler systems or by establishing a public fire department. If churches may benefit on equal terms with other groups in the latter program—that is, if a public fire department may extinguish fires at churches—then they may also benefit on equal terms in the former program.

Though our Establishment Clause jurisprudence is in hopeless disarray, this case provides an opportunity to reaffirm one basic principle that has enjoyed an uncharacteristic degree of consensus: The Clause does not compel the exclusion of religious groups from government benefits programs that are generally available to a broad class of participants. See *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993); *Zobrest, supra; Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens,* 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990); *Texas Monthly, Inc. v. Bullock,* 489 U.S. 1, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989); *Witters v. Washington Dept. of Servs. for Blind,* 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986); *Mueller v. Allen,* 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983); *Widmar, supra.* Under the dissent's view, however, the University of Virginia may provide neutral access to the University's own printing press, but it may not provide the same service when the press is owned by a third party. Not surprisingly, ***862** the dissent offers no logical justification for this conclusion, and none is evident in the text or original meaning of the First Amendment.

If the Establishment Clause is offended when religious adherents benefit from neutral programs such as the University of Virginia's Student Activities Fund, it must also ****2533** be offended when they receive the same benefits in the form of in-kind subsidies. The constitutional demands of the Establishment Clause may be judged against either a baseline of "neutrality" or a baseline of "no aid to religion," but the appropriate baseline surely cannot depend on the fortuitous circumstances surrounding the *form* of aid. The contrary rule would lead to absurd results that would jettison centuries of practice respecting the right of religious adherents to participate on neutral terms in a wide variety of government-funded programs.

Our Nation's tradition of allowing religious adherents to participate in evenhanded government programs is hardly limited to the class of "essential public benefits" identified by the dissent. See *post,* at 2541, n. 5. A broader tradition can be traced at least as far back as the First Congress, which ratified the Northwest Ordinance of 1787. See Act of Aug. 7, 1789, ch. 8, 1 Stat. 50. Article III of that famous enactment of the Confederation Congress had provided: "Religion, morality, and knowledge ... being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *Id.,* at 52, n. (a). Congress subsequently set aside federal lands in the Northwest Territory and other territories for the use of schools. See, *e.g.,* Act of Mar. 3, 1803, ch. 21, § 1, 2 Stat. 225–226; Act of Mar. 26, 1804, ch. 35, § 5, 2 Stat. 279; Act of Feb. 15, 1811, ch. 14, § 10, 2 Stat. 621; Act of Apr. 18, 1818, ch. 67, § 6, 3 Stat. 430; Act of Apr. 20, 1818, ch. 126, § 2, 3 Stat. 467. Many of the schools that enjoyed the benefits of these land grants

undoubtedly were church-affiliated sectarian institutions as there was no requirement that the schools be "public." See ***863** C. Antieau, A. Downey, & E. Roberts, Freedom From Federal Establishment, Formation and Early History of the First Amendment Religion Clauses 163 (1964). Nevertheless, early Congresses found no problem with the provision of such neutral benefits. See also *id.,* at 174 (noting that "almost universally [,] Americans from 1789 to 1825 accepted and practiced governmental aid to religion and religiously oriented educational institutions").

Numerous other government benefits traditionally have been available to religious adherents on neutral terms. Several examples may be found in the work of early Congresses, including copyright protection for "the author and authors of any map, chart, book or books," Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, and a privilege allowing "every printer of newspapers [to] send one paper to each and every other printer of newspapers within the United States, free of postage," Act of Feb. 20, 1792, ch. 7, § 21, 1 Stat. 238. Neither of these laws made any exclusion for the numerous authors or printers who manifested a belief in or about a deity.

Thus, history provides an answer for the constitutional question posed by this case, but it is not the one given by the dissent. The dissent identifies no evidence that the Framers intended to disable religious entities from participating on neutral terms in evenhanded government programs. The evidence that does exist points in the opposite direction and provides ample support for today's decision.

Justice SOUTER, with whom Justice STEVENS, Justice GINSBURG, and Justice BREYER join, dissenting.

The Court today, for the first time, approves direct funding of core religious activities by an arm of the State. It does so, however, only after erroneous treatment of some familiar principles of law implementing the First Amendment's Establishment and Speech Clauses, and by viewing the very funds in question as beyond the reach of the Establishment Clause's funding restrictions as such. Because there is no ***864** warrant for distinguishing among public funding sources for purposes of applying the First Amendment's prohibition of religious establishment, I would hold that the University's refusal to support petitioners' religious activities is compelled by the Establishment Clause. I would therefore affirm.

I

The central question in this case is whether a grant from the Student Activities Fund to pay Wide Awake's printing expenses ****2534** would violate the Establishment Clause. Although the Court does not dwell on the details of Wide Awake's message, it recognizes something sufficiently religious in the publication to demand Establishment Clause scrutiny. Although the Court places great stress on the eligibility of secular as well as religious activities for grants from the Student Activities Fund, it recognizes that such evenhanded availability is not by itself enough to satisfy constitutional requirements for any aid scheme that results in a benefit to religion. *Ante,* at 2521; see also *ante,* at 2525–2526 (O'CONNOR, J., concurring). Something more is necessary to justify any religious aid. Some Members of the Court, at least, may think the funding permissible on a view that it is indirect, since the money goes to Wide Awake's printer, not through Wide Awake's own checking account. The Court's principal reliance, however, is on an argument that providing religion with economically valuable services is permissible on the theory that services are economically indistinguishable from religious access to governmental speech forums, which sometimes is permissible. But this reasoning would commit the Court to approving direct religious aid beyond anything justifiable for the sake of access to speaking forums. The Court implicitly recognizes this in its further attempt to circumvent the clear bar to direct governmental aid to religion. Different Members of the Court seek to avoid this bar in different ways. The opinion of the Court makes the novel assumption that only direct aid financed with tax ***865** revenue is barred, and draws the erroneous conclusion that the involuntary Student Activities Fee is not a tax. I do not read Justice O'CONNOR's opinion as sharing that assumption; she places this Student Activities Fund in a category of student funding enterprises from which religious activities in public universities may benefit, so long as there is no consequent endorsement of religion. The resulting decision is in unmistakable tension with the accepted law that the Court continues to avow.

A

The Court's difficulties will be all the more clear after a closer look at Wide Awake than the majority opinion affords. The character of the magazine is candidly disclosed on the opening page of the first issue, where the editor-in-chief announces Wide Awake's mission in a letter to the readership signed, "Love in Christ": it is "to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means." App. 45. The masthead of every issue bears St. Paul's exhortation, that "[t]he hour has come for you to awake from your slumber, because our salvation is nearer now than when we first believed. Romans 13:11."

Each issue of Wide Awake contained in the record makes good on the editor's promise and echoes the Apostle's call to accept salvation:

> "The only way to salvation through Him is by confessing and repenting of sin. It is the Christian's duty to make sinners aware of their need for salvation. Thus, Christians must confront and condemn sin, or else they fail in their duty of love." Mourad & Prince, A Love/Hate Relationship, Nov./Dec. 1990, p. 3.

> "When you get to the final gate, the Lord will be handing out boarding passes, and He will examine your ticket. If, in your lifetime, you did not request a seat ***866** on His Friendly Skies Flyer by trusting Him and asking Him to be your pilot, then you will not be on His list of reserved seats (and the Lord will know you not). You will not be able to buy a ticket then; no amount of money or desire will do the trick. You will be met by your chosen pilot and flown straight to Hell on an express jet (without air conditioning or toilets, of course)." Ace, The Plane Truth, *ibid.*

> " 'Go into all the world and preach the good news to all creation.' (Mark 16:15) The Great Commission is the prime-directive for our lives as Christians...." Liu, Christianity and the Five-legged Stool, Sept./Oct. 1991, p. 3.

> "The Spirit provides access to an intimate relationship with the Lord of the Universe, awakens our minds to comprehend spiritual truth and empowers us to serve as effective ambassadors for the Lord Jesus ****2535** in our earthly lives." Buterbaugh, A Spiritual Advantage, Mar./Apr. 1991, p. 21.

There is no need to quote further from articles of like tenor, but one could examine such other examples as religious poetry, see Macpherson, I Have Started Searching for Angels, Nov./Dec. 1990, p. 18; religious textual analysis and commentary, see Buterbaugh, Colossians 1:1–14: Abundant Life, *id.,* at 20; Buterbaugh, John 14–16: A Spiritual Advantage, Mar./Apr., pp. 20–21; and instruction on religious practice, see Early, Thanksgiving and Prayer, Nov./ Dec. 1990, p. 21 (providing readers with suggested prayers and posing contemplative questions about biblical texts); Early, Hope and Spirit, Mar./ Apr. 1991, p. 21 (similar).

Even featured essays on facially secular topics become platforms from which to call readers to fulfill the tenets of Christianity in their lives. Although a piece on racism has some general discussion on the subject, it proceeds beyond even the analysis and interpretation of biblical texts to conclude ***867** with the counsel to take action because that is the Christian thing to do:

> "God calls us to take the risks of voluntarily stepping out of our comfort zones and to take joy in the whole richness of our inheritance in the body of Christ. We must take the love we receive from God and share it with all peoples of the world.

> "Racism is a disease of the heart, soul, and mind, and only when it is extirpated from the individual consciousness and replaced with the love and peace of God will true personal and communal healing begin." Liu, Rosenberger, Mourad, and Prince, "Eracing" Mistakes, Nov./Dec. 1990, p. 14.

The same progression occurs in an article on eating disorders, which begins with descriptions of anorexia and bulimia and ends with this religious message:

> "As thinking people who profess a belief in God, we must grasp firmly the truth, the reality of who we are because of Christ. Christ is the Bread of Life (John 6:35). Through Him, we are full. He alone can provide the ultimate source of spiritual fulfillment which permeates the emotional, psychological, and physical dimensions of our lives." Ferguson & Lassiter, From Calorie to Calvary, Sept./Oct. 1991, p. 14.

This writing is no merely descriptive examination of religious doctrine or even of ideal Christian practice in confronting life's social and personal problems. Nor is it merely the expression of editorial opinion that incidentally coincides with Christian ethics and reflects a Christian view of human obligation. It is straightforward exhortation to enter into a relationship with God as revealed in Jesus Christ, and to satisfy a series of moral obligations derived from the teachings of Jesus Christ. These are not the words of "student news, information, opinion, entertainment, or academic communicatio[n] ..." (in the language of the University's funding ***868** criterion, App. to Pet. for Cert. 61a), but the words of "challenge [to] Christians to live, in word and deed, according to the faith they proclaim and ... to consider what a personal relationship with Jesus Christ means" (in the language of Wide Awake's founder, App. 45). The subject is not the discourse of the scholar's study or the seminar room, but of the evangelist's mission station and the pulpit. It is nothing other than the preaching of the word, which (along with the sacraments) is what most branches of Christianity offer those called to the religious life.

Using public funds for the direct subsidization of preaching the word is categorically forbidden under the Establishment Clause, and if the Clause was meant to accomplish nothing else, it was meant to bar this use of public money. Evidence on the subject antedates even the Bill of Rights itself, as may be seen in the writings of Madison, whose authority on questions about the meaning of the Establishment Clause is well settled, *e.g., Committee for Public Ed. & Religious Liberty v. Nyquist,* 413 U.S. 756, 770, n. 28, 93 S.Ct. 2955, 2964, n. 28, 37 L.Ed.2d 948 (1973); *Everson v. Board of Ed. of Ewing,* 330 U.S. 1, 13, 67 S.Ct. 504, 510, 91 L.Ed. 711 (1947). Four years before the First Congress proposed the First Amendment, Madison gave his opinion on the legitimacy of using public funds for religious purposes, in the Memorial ****2536** and Remonstrance Against Religious Assessments, which played the central role in ensuring the defeat of the Virginia tax assessment bill in 1786 and framed the debate upon which the Religion Clauses stand:

> "Who does not see that ... the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" James Madison, Memorial and Remonstrance Against Religious Assessments ¶ 3 (hereinafter Madison's Remonstrance), reprinted in *Everson, supra,* at 65–66 [67 S.Ct., at 524] (appendix to dissent of Rutledge, J.).

***869** Madison wrote against a background in which nearly every Colony had exacted a tax for church support, *Everson, supra,* at 10, n. 8, 67 S.Ct., at 509, n. 8, the practice having become "so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence," 330 U.S., at 11, 67 S.Ct., at 509 (footnote omitted). Madison's Remonstrance captured the colonists' "conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group." *Ibid.* [1] Their sentiment, as expressed by Madison in Virginia, ***870** led not ****2537** only to the defeat of Virginia's tax assessment bill, but also directly to passage of the Virginia Bill for Establishing Religious Freedom, written by Thomas Jefferson. That ***871** bill's preamble declared that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical," Jefferson, A Bill for Establishing Religious Freedom, reprinted in 5 The Founder's Constitution 84 (P. Kurland & R. Lerner eds. 1987), and its text provided "[t]hat no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever...," *id.,* at 85. See generally *Everson,* 330 U.S., at 13, 67 S.Ct., at 510. We have "previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute." *Ibid.;* see also Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 Wm. & Mary L.Rev. 875, 921, 923 (1986) ("[I]f the debates of the 1780's support any proposition, it is that the Framers opposed government financial support for religion.... They did not substitute small taxes for large taxes; three pence was as bad as any larger sum. The principle was what mattered. With respect to money, religion was to be wholly voluntary. Churches either would support ***872** themselves or they would not, but the government would neither help nor interfere") (footnote omitted); T. Curry, The First Freedoms 217 (1986) (At the time of the framing of the Bill of Rights, "[t]he belief that government

assistance to religion, especially in the form of taxes, violated religious liberty had a long history"); J. Choper, Securing Religious Liberty 16 (1995) ("There is broad consensus that a central threat to the religious freedom of individuals and groups—indeed, in the judgment of many the most serious infringement upon religious liberty—is posed by forcing them to pay taxes in support of a religious establishment or religious activities") (footnotes omitted; internal quotation marks omitted). [2]

1 Justice THOMAS suggests that Madison would have approved of the assessment bill if only it had satisfied the principle of evenhandedness. Nowhere in the Remonstrance, however, did Madison advance the view that Virginia should be able to provide financial support for religion as part of a generally available subsidy program. Indeed, while Justice THOMAS claims that the "funding provided by the Virginia assessment was to be extended only to Christian sects," *ante,* at 2529, it is clear that the bill was more general in scope than this. While the bill, which is reprinted in *Everson v. Board of Ed. of Ewing,* 330 U.S. 1, 72–74, 67 S.Ct. 504, 538–540, 91 L.Ed. 711 (1947), provided that each taxpayer could designate a religious society to which he wanted his levy paid, *id.,* at 73, 67 S.Ct., at 539, it would also have allowed a taxpayer to refuse to appropriate his levy to any religious society, in which case the legislature was to use these unappropriated sums to fund "seminaries of learning." *Id.,* at 74, 67 S.Ct., at 540 (contrary to Justice THOMAS's unsupported assertion, this portion of the bill was no less obligatory than any other). While some of these seminaries undoubtedly would have been religious in character, others would not have been, as a seminary was generally understood at the time to be "any school, academy, college or university, in which young persons are instructed in the several branches of learning which may qualify them for their future employments." N. Webster, An American Dictionary of the English Language (1st ed. 1828); see also 14 The Oxford English Dictionary 956 (2d ed.1989). Not surprisingly, then, scholars have generally agreed that the bill would have provided funding for nonreligious schools. See, *e.g.,* Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 Wm. & Mary L.Rev. 875, 897 and n. 108 (1986) ("Any taxpayer could refuse to designate a church, with undesignated church taxes going to a fund for schools.... The bill used the phrase 'seminaries of learning,' which almost certainly meant schools generally and not just schools for the training of ministers"); T. Buckley, Church and State in Revolutionary Virginia, 1776–1787, p. 133 (1977) ("The assessment had been carefully drafted to permit those who preferred to support education rather than religion to do so"); T. Curry, The First Freedoms 141 (1986) ("[T]hose taxes not designated for any specific denomination [were] allocated to education"). It is beside the point that "there was no system of public education in Virginia until several decades after the assessment bill was proposed," *ante,* at 2529, n. 1 (THOMAS, J., concurring); because the bill was never passed, the funds that it would have made available for secular, public schools never materialized. The fact that the bill, if passed, would have funded secular as well as religious instruction did nothing to soften Madison's opposition to it.

Nor is it fair to argue that Madison opposed the bill only because it treated religious groups unequally. *Ante,* at 2529 (THOMAS, J., concurring). In various paragraphs of the Remonstrance, Madison did complain about the bill's peculiar burdens and exemptions, *Everson, supra,* at 66, 67 S.Ct., at 536, but to identify this factor as the sole point of Madison's opposition to the bill is unfaithful to the Remonstrance's text. Madison strongly inveighed against the proposed aid for religion for a host of reasons (the Remonstrance numbers 15 paragraphs, each containing at least one point in opposition), and crucial here is the fact that many of those reasons would have applied whether or not the state aid was being distributed equally among sects, and whether or not the aid was going to those sects in the context of an evenhanded government program. See, *e.g.,* Madison's Remonstrance, reprinted in *Everson,* 330 U.S., at 64, 67 S.Ct., at 535, ¶ 1 ("[I]n matters of Religion, no man's right is abridged by the institution of Civil Society, and ... Religion is wholly exempt from its cognizance"); *id.,* at 67, 67 S.Ct., at 536–537, ¶ 6 (arguing that state support of religion "is a contradiction to the Christian Religion itself; for every page of it disavows a dependence on the powers of this world"); *ibid.,* ¶ 7 ("[E]xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation"). Madison's objections were supplemented by numerous other petitions in opposition to the bill that likewise do not suggest that the lack of evenhandedness was its dispositive flaw. L. Levy, The Establishment Clause: Religion and the First Amendment 63–

67 (2d ed.1994). For example, the petition that received the largest number of signatories was motivated by the view that religion should only be supported voluntarily. *Id.,* at 63–64. Indeed, Madison's Remonstrance did not argue for a bill distributing aid to all sects and religions on an equal basis, and the outgrowth of the Remonstrance and the defeat of the Virginia assessment was not such a bill; rather, it was the Virginia Bill for Establishing Religious Freedom, which, as discussed in the text, proscribed the use of tax dollars for religious purposes.

In attempting to recast Madison's opposition as having principally been targeted against "governmental preferences for *particular* religious faiths," *ante,* at 2530 (emphasis in original), Justice THOMAS wishes to wage a battle that was lost long ago, for "this Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another," *School Dist. of Abington Township v. Schempp,* 374 U.S. 203, 216, 83 S.Ct. 1560, 1568, 10 L.Ed.2d 844 (1963); see also *Texas Monthly, Inc. v. Bullock,* 489 U.S. 1, 17, 109 S.Ct. 890, 900–901, 103 L.Ed.2d 1 (1989) (plurality opinion); *id.,* at 28, 109 S.Ct., at 906–907 (Blackmun, J., concurring in judgment); *Wallace v. Jaffree,* 472 U.S. 38, 52–53, 105 S.Ct. 2479, 2487–2488, 86 L.Ed.2d 29 (1985); *Torcaso v. Watkins,* 367 U.S. 488, 495, 81 S.Ct. 1680, 1683, 6 L.Ed.2d 982 (1961); *Engel v. Vitale,* 370 U.S. 421, 430, 82 S.Ct. 1261, 1266–1267, 8 L.Ed.2d 601 (1962); *Everson, supra,* at 15, 67 S.Ct., at 511; see generally *Lee v. Weisman,* 505 U.S. 577, 609–616, 112 S.Ct. 2649, 2667–2670, 120 L.Ed.2d 467 (1992) (SOUTER, J., concurring).

2 Justice THOMAS attempts to cast doubt on this accepted version of Establishment Clause history by reference to historical facts that are largely inapposite. *Ante,* at 2530–2531, 2532–2533 (concurring opinion). As I have said elsewhere, individual Acts of Congress, especially when they are few and far between, scarcely serve as an authoritative guide to the meaning of the Religion Clauses, for "like other politicians, [members of the early Congresses] could raise constitutional ideals one day and turn their backs on them the next. [For example,] ... [t]en years after proposing the First Amendment, Congress passed the Alien and Sedition Acts, measures patently unconstitutional by modern standards. If the early Congress's political actions were determinative, and not merely relevant, evidence of constitutional meaning, we would have to gut our current First Amendment doctrine to make room for political censorship." *Lee v. Weisman, supra,* at 626, 112 S.Ct., at 2676 (concurring opinion). The legislation cited by Justice THOMAS, including the Northwest Ordinance, is no more dispositive than the Alien and Sedition Acts in interpreting the First Amendment. Even less persuasive, then, are citations to constitutionally untested Acts dating from the mid–19th century, for without some rather innovative argument, they cannot be offered as providing an authoritative gloss on the Framers' intent.

Justice THOMAS'S references to Madison's actions as a legislator also provide little support for his cause. Justice THOMAS seeks to draw a significant lesson out of the fact that, in seeking to disestablish the Anglican Church in Virginia in 1776, Madison did not inveigh against state funding of religious activities. *Ante,* at 2530 (concurring opinion). That was not the task at hand, however. Madison was acting with the specific goal of eliminating the special privileges enjoyed by Virginia Anglicans, and he made no effort to lay out the broader views of church and state that came to bear in his drafting of the First Amendment some 13 years later. That Madison did not speak in more expansive terms than necessary in 1776 was hardly surprising for, as it was, his proposal was defeated by the Virginia Convention as having gone too far. *Ibid.*

Similarly, the invocation of Madison's tenure on the congressional committee that approved funding for legislative chaplains provides no support for more general principles that run counter to settled Establishment Clause jurisprudence. As I have previously pointed out, Madison, upon retirement, "insisted that 'it was not with my approbation, that the deviation from [the immunity of religion from civil jurisdiction] took place in Congs., when they appointed Chaplains, to be paid from the Natl. Treasury.' " *Lee,* 505 U.S., at 625, n. 6, 112 S.Ct., at 2675, n. 6, quoting Letter from J. Madison to E. Livingston (July 10, 1822), in 5 The Founders' Constitution 105 (P. Kurland & R. Lerner eds. (1987)). And when we turned our attention to deciding whether funding of legislative chaplains posed an establishment problem, we did not address the practice as one instance of a larger class of permissible government funding of religious activities. Instead, *Marsh v. Chambers,* 463 U.S. 783, 791, 103 S.Ct. 3330, 3335–3336, 77 L.Ed.2d 1019 (1983), explicitly relied on the singular, 200–year pedigree of legislative chaplains, noting that "[t]his unique history" justified carving

out an exception for the specific practice in question. Given that the decision upholding this practice was expressly limited to its facts, then, it would stand the Establishment Clause on its head to extract from it a broad rule permitting the funding of religious activities.

****2538 *873** The principle against direct funding with public money is patently violated by the contested use of today's student activity fee.[3] Like today's taxes generally, the fee is Madison's threepence. The University exercises the power of the State to compel a student to pay it, see Jefferson's Preamble, *supra,* and the use of any part of it for the direct support of religious activity thus strikes at what we have repeatedly ***874** held to be the heart of the prohibition on establishment. *Everson,* 330 U.S., at 15–16, 67 S.Ct., at 511 (The 'establishment of religion' clause ... means at least this.... No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion"); see *School Dist. of Grand Rapids v. Ball,* 473 U.S. 373, 385, 105 S.Ct. 3216, 3223, 87 L.Ed.2d 267 (1985) ("Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith"); *Committee for Public Ed. v. Nyquist,* 413 U.S., at 780, 93 S.Ct., at 2968 ("In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid"); *id.,* at 772, 93 S.Ct., at 2969 ("Primary among those evils" against which the Establishment Clause guards "have been sponsorship, financial support, and active involvement of the sovereign in religious activity") (citations and internal quotation marks omitted); see also *Lee v. Weisman,* 505 U.S. 577, 640, 112 S.Ct. 2649, 2683, 120 L.Ed.2d 467 (1992) (SCALIA, J., dissenting) ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty") (emphasis deleted); cf. *Flast v. Cohen,* 392 U.S. 83, 103–104, 88 S.Ct. 1942, 1954–1955, 20 L.Ed.2d 947 (1968) (holding that taxpayers have an adequate stake in the outcome of Establishment Clause litigation to satisfy Article III standing requirements, after ****2539** stating that "[o]ur history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general").

3 In the District Court, the parties agreed to the following facts: "The University of Virginia has charged at all times relevant herein and currently charges each full-time student a compulsory student activity fee of $14.00 per semester. There is no procedural or other mechanism by which a student may decline to pay the fee." App. 37; see also *id.,* at 9, 21.

The Court, accordingly, has never before upheld direct state funding of the sort of proselytizing published in Wide ***875** Awake and, in fact, has categorically condemned state programs directly aiding religious activity, *School Dist. v. Ball, supra,* at 395, 105 S.Ct., at 3228–3229 (striking programs providing secular instruction to nonpublic school students on nonpublic school premises because they are "indistinguishable from the provision of a direct cash subsidy to the religious school that is most clearly prohibited under the Establishment Clause"); *Wolman v. Walter,* 433 U.S. 229, 254, 97 S.Ct. 2593, 2608–2609, 53 L.Ed.2d 714 (1977) (striking field trip aid program because it constituted "an impermissible direct aid to sectarian education"); *Meek v. Pittenger,* 421 U.S. 349, 365, 95 S.Ct. 1753, 1763, 44 L.Ed.2d 217 (1975) (striking material and equipment loan program to nonpublic schools because of the inability to "channe[l] aid to the secular without providing direct aid to the sectarian"); *Committee for Public Ed. v. Nyquist, supra,* at 774, 93 S.Ct., at 2966 (striking aid to nonpublic schools for maintenance and repair of facilities because "[n]o attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes"); *Levitt v. Committee for Public Ed. & Religious Liberty,* 413 U.S. 472, 480, 93 S.Ct. 2814, 2819, 37 L.Ed.2d 736 (1973) (striking aid to nonpublic schools for state-mandated tests because the State had failed to "assure that the state-supported activity is not being used for religious indoctrination"); *Tilton v. Richardson,* 403 U.S. 672, 683, 91 S.Ct. 2091, 2098, 29 L.Ed.2d 790 (1971) (plurality opinion) (striking as insufficient a 20–year limit on prohibition for religious use in federal construction program for university facilities because unrestricted use even after 20 years "is in effect a contribution of some value to a religious body"); *id.,* at 689, 91 S.Ct., at 2101 (Douglas, J., joined by Black, and Marshall, JJ., concurring in part and dissenting in part).

Even when the Court has upheld aid to an institution performing both secular and sectarian functions, it has always made a searching enquiry to ensure that the institution kept the secular activities separate from its sectarian ones, with any direct aid flowing only to the former and never the latter. *Bowen v. Kendrick,* 487 U.S. 589, 614–615, 108 S.Ct. 2562, 2577, 101 L.Ed.2d 520 (1988) (upholding ***876** grant program for services related to premarital adolescent sexual relations on ground that funds cannot be "used by the grantees in such a way as to advance religion"); *Roemer v. Board of Public Works of Md.,* 426 U.S. 736, 746–748, 755, 759–761, 96 S.Ct. 2337, 2344–2346, 2349, 2351–2352, 49 L.Ed.2d 179 (1976) (plurality opinion) (upholding general aid program restricting uses of funds to secular activities only); *Hunt v. McNair,* 413 U.S. 734, 742–745, 93 S.Ct. 2868, 2873–2875, 37 L.Ed.2d 923 (1973) (upholding general revenue bond program excluding from participation facilities used for religious purposes); *Tilton v. Richardson, supra,* at 679–682, 91 S.Ct., at 2096–2098 (plurality opinion) (upholding general aid program for construction of academic facilities as "[t]here is no evidence that religion seeps into the use of any of these facilities"); see *Board of Ed. of Central School Dist. No. 1 v. Allen,* 392 U.S. 236, 244–248, 88 S.Ct. 1923, 1926–1929, 20 L.Ed.2d 1060 (1968) (upholding textbook loan program limited to secular books requested by individual students for secular educational purposes).

Reasonable minds may differ over whether the Court reached the correct result in each of these cases, but their common principle has never been questioned or repudiated. "Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed ... indoctrination into the beliefs of a particular religious faith." *School Dist. v. Ball,* 473 U.S., at 385, 105 S.Ct., at 3223.

B

Why does the Court not apply this clear law to these clear facts and conclude, as I do, that the funding scheme here is a clear constitutional ****2540** violation? The answer must be in part that the Court fails to confront the evidence set out in the preceding section. Throughout its opinion, the Court refers uninformatively to Wide Awake's "Christian viewpoint," *ante,* at 2515, or its "religious perspective," *ante,* at 2518, and in distinguishing funding of Wide Awake from the funding of a church, the Court maintains that "[Wide Awake] is not a religious institution, at least in the usual sense," ***877** *ante,* at 2524;[4] see also *ante,* at 2515. The Court does not quote the magazine's adoption of Saint Paul's exhortation to awaken to the nearness of salvation, or any of its articles enjoining readers to accept Jesus Christ, or the religious verses, or the religious textual analyses, or the suggested prayers. And so it is easy for the Court to lose sight of what the University students and the Court of Appeals found so obvious, and to blanch the patently and frankly evangelistic character of the magazine by unrevealing allusions to religious points of view.

4 To the extent the Court perceives some distinction between the printing and dissemination of evangelism and proselytization, and core religious activity "in [its] usual sense," *ante,* at 2524, this distinction goes entirely unexplained in the Court's opinion.

Nevertheless, even without the encumbrance of detail from Wide Awake's actual pages, the Court finds something sufficiently religious about the magazine to require examination under the Establishment Clause, and one may therefore ask why the unequivocal prohibition on direct funding does not lead the Court to conclude that funding would be unconstitutional. The answer is that the Court focuses on a subsidiary body of law, which it correctly states but ultimately misapplies. That subsidiary body of law accounts for the Court's substantial attention to the fact that the University's funding scheme is "neutral," in the formal sense that it makes funds available on an evenhanded basis to secular and sectarian applicants alike. *Ante,* at 2521–2523. While this is indeed true and relevant under our cases, it does not alone satisfy the requirements of the Establishment Clause, as the Court recognizes when it says that evenhandedness is only a "significant factor" in certain Establishment Clause analysis, not a dispositive one. *Ante,* at 2521; see *ante,* at 2522–2523; see also *ante,* at 2525–2526 (O'CONNOR, J., concurring); *ante,* at 2525 ("Neutrality, in both form and effect, is one hallmark of the Establishment Clause"); *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 777, 115 S.Ct. 2440, 2454, 132 L.Ed.2d 650 (O'CONNOR, J., concurring ***878** in part and concurring in judgment) ("[T]he Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions....

[N]ot all state policies are permissible under the Religion Clauses simply because they are neutral in form"). This recognition reflects the Court's appreciation of two general rules: that whenever affirmative government aid ultimately benefits religion, the Establishment Clause requires some justification beyond evenhandedness on the government's part; and that direct public funding of core sectarian activities, even if accomplished pursuant to an evenhanded program, would be entirely inconsistent with the Establishment Clause and would strike at the very heart of the Clause's protection. See *ante,* at 2523 ("We do not confront a case where, even under a neutral program that includes nonsectarian recipients, the government is making direct money payments to an institution or group that is engaged in religious activity"); *ante,* at 2522, 2524; see also *ante,* at 2525 (O'CONNOR, J., concurring) ("[Our] decisions ... provide no precedent for the use of public funds to finance religious activities").

In order to understand how the Court thus begins with sound rules but ends with an unsound result, it is necessary to explore those rules in greater detail than the Court does. As the foregoing quotations from the Court's opinion indicate, the relationship between the prohibition on direct aid and the requirement of evenhandedness when affirmative government aid does result in some benefit to religion reflects the relationship between basic rule and marginal criterion. ****2541** At the heart of the Establishment Clause stands the prohibition against direct public funding, but that prohibition does not answer the questions that occur at the margins of the Clause's application. Is any government activity that provides any incidental benefit to religion likewise unconstitutional? Would it be wrong to put out fires in burning churches, wrong to pay the bus fares of students on the way ***879** to parochial schools, wrong to allow a grantee of special education funds to spend them at a religious college? These are the questions that call for drawing lines, and it is in drawing them that evenhandedness becomes important. However the Court may in the past have phrased its line-drawing test, the question whether such benefits are provided on an evenhanded basis has been relevant, for the question addresses one aspect of the issue whether a law is truly neutral with respect to religion (that is, whether the law either "advance[s] [or] inhibit[s] religion," *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573, 592, 109 S.Ct. 3086, 3100, 106 L.Ed.2d 472 (1989)). In *Widmar v. Vincent,* 454 U.S. 263, 274, 102 S.Ct. 269, 276, 70 L.Ed.2d 440 (1981), for example, we noted that "[t]he provision of benefits to [a] broad ... spectrum of [religious and nonreligious] groups is an important index of secular effect." See also *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet,* 512 U.S. 687, 702–705, 114 S.Ct. 2481, 2491–2492, 129 L.Ed.2d 546 (1994). In the doubtful cases (those not involving direct public funding), where there is initially room for argument about a law's effect, evenhandedness serves to weed out those laws that impermissibly advance religion by channelling aid to it exclusively. Evenhandedness is therefore a prerequisite to further enquiry into the constitutionality of a doubtful law,[5] but evenhandedness goes no further. It does not guarantee success under Establishment Clause scrutiny.

5 In a narrow band of cases at the polar extreme from direct funding cases, those involving essential public benefits commonly associated with living in an organized society (like police and fire protection, for example), evenhandedness may become important to ensuring that religious interests are not inhibited.

Three cases permitting indirect aid to religion, *Mueller v. Allen,* 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983), *Witters v. Washington Dept. of Servs. for Blind,* 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986), and *Zobrest v. Catalina Foothills School Dist.,* 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993), are among the latest of those to illustrate this relevance of evenhandedness when advancement is not so obvious as to be patently unconstitutional. ***880** Each case involved a program in which benefits given to individuals on a religion-neutral basis ultimately were used by the individuals, in one way or another, to support religious institutions.[6] In each, the fact that aid was distributed generally and on a neutral basis was a necessary condition for upholding the program at issue. *Witters, supra,* at 487–488, 106 S.Ct., at 751; *Mueller, supra,* at 397–399, 103 S.Ct. at 3068–3069; *Zobrest, supra,* at 10–11, 113 S.Ct., at 2467–2468. But the significance of evenhandedness stopped there. We did not, in any of these cases, hold that satisfying the condition was sufficient, or dispositive. Even more importantly, we never held that evenhandedness might be sufficient to render direct aid to religion constitutional. Quite the contrary. Critical to our decisions in these cases was the fact that the aid was indirect; it reached religious institutions "only as a result of the genuinely independent and private choices of aid recipients," *Witters, supra,* at 487, 106 S.Ct., at 752; see also *Mueller, supra,* at 399–400, 103 S.Ct., at 3069–3070; *Zobrest, supra,* at 10–13, 113 S.Ct., at 2467–2469.

In noting and relying on this particular feature of each of the programs at issue, we in fact reaffirmed the core prohibition on direct funding of religious activities. See *Zobrest,* ****2542** *supra,* at 12–13, 113 S.Ct., at 2468–2469; *Witters, supra,* at 487, 106 S.Ct., at 752; see also *Mueller, supra,* at 399–400, 103 S.Ct., at 3069–3070. Thus, our holdings in these cases were little more than extensions of the unremarkable proposition that "a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier...." *Witters, supra,* at 486–487, 106 S.Ct., at 751. Such "attenuated financial benefit[s], ultimately controlled by the private choices of individual[s]," ***881** we have found, are simply not within the contemplation of the Establishment Clause's broad prohibition. *Mueller, supra,* at 400, 103 S.Ct., at 3069–3070; see also *Witters, supra,* at 493, 106 S.Ct., at 754–755 (opinion of O'CONNOR, J.). [7]

6 In *Zobrest,* a deaf student sought to have an interpreter, provided under a state Act aiding individuals with disabilities, accompany him to a Roman Catholic high school. In *Witters,* a blind student sought to use aid, provided under a state program for assistance to handicapped persons, to attend a private Christian college. In *Mueller,* parents sought to take a tax deduction, available for parents of both public and nonpublic schoolchildren, for certain expenses incurred in connection with providing education for their children in private religious schools.

7 *Walz v. Tax Comm'n of City of New York,* 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970), is yet another example of a case in which the Court treated the general availability of a government benefit as a significant condition defining compliance with the Establishment Clause, but did not deem that condition sufficient. In upholding state property tax exemptions given to religious organizations in *Walz,* we noted that the law at issue was applicable to "a broad class of property owned by nonprofit [and] quasipublic corporations," *id.,* at 673, 90 S.Ct., at 1413, but did not rest on that factor alone. Critical to our decision was the central principle that direct funding of religious activities is prohibited under the Establishment Clause. "It is sufficient to note that for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." *Id.,* at 668, 90 S.Ct., at 1411. We emphasized that the tax exemptions did not involve the expenditure of government funds in support of religious activities. "The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." *Id.,* at 675, 90 S.Ct., at 1415. Moreover, we noted that in the property taxation context, "exemption[s] creat[e] only a minimal and remote involvement between church and state and far less than taxation of churches," and in operation "ten[d] to complement and reinforce the desired separation insulating" church and state, *id.,* at 676, 90 S.Ct., at 1415; and that religious property tax exemptions have been in place for over 200 years without disruption to the interests represented by the Establishment Clause, *id.,* at 676–680, 90 S.Ct., at 1415–1417.

Justice THOMAS's assertion, that "[a] tax exemption in many cases is economically and functionally indistinguishable from a direct monetary subsidy," *ante,* at 2531 (concurring opinion) (footnote omitted), assumes that the "natural" or "correct" tax base is so self-evident that any provision excusing a person or institution from taxes to which others are subjected must be a departure from the natural tax base rather than part of the definition of the tax base itself. The equivalence (asserted by Justice THOMAS, *ibid.*) between a direct money subsidy and the tax liability avoided by an institution (because it is part of the class of institutions that defines the relevant tax base by its exclusion) was tested and dispatched long ago by Professor Bittker in Churches, Taxes and the Constitution, 78 Yale L.J. 1285 (1969). Justice THOMAS's suggestion that my "reliance on Bittker ... is misplaced in this context," *ante,* at 2532, n. 5, is not on point. Even granting that Justice THOMAS's assertion of equivalence is reasonable, he cannot and does not deny the fact that the Court in *Walz* explicitly distinguished tax exemptions from direct money subsidies, 397 U.S., at 675, 90 S.Ct., at 1414, and rested its decision on that distinction. If Justice THOMAS's assertion of equivalence should prevail then the *Walz* Court necessarily was wrong about a distinction critical to its holding. Justice THOMAS can hardly use *Walz* coherently for support after removing the basis on which it relies.

***882** Evenhandedness as one element of a permissibly attenuated benefit is, of course, a far cry from evenhandedness as a sufficient condition of

constitutionality for direct financial support of religious proselytization, and our cases have unsurprisingly repudiated any such attempt to cut the Establishment Clause down to a mere prohibition against unequal direct aid. See, *e.g., Tilton v. Richardson,* 403 U.S., at 682–684, 91 S.Ct., at 2097–2099 (striking portion of general aid program providing grants for construction of college and university facilities to the extent program made possible the use of funds for sectarian activities);[8] *Wolman v. Walter,* 433 U.S., at 252–255, 97 S.Ct., at 2608–09 (striking funding of field trips for nonpublic school students, such as are "provided to public ****2543** school students in the district," because of unacceptable danger that state funds would be used to foster religion). And nowhere has the Court's adherence to the preeminence of the no-direct-funding principle over the principle of evenhandedness been as clear as in *Bowen v. Kendrick,* 487 U.S. 589, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988).

8 Although the main opinion in *Tilton* was a plurality, the entire Court was unanimous on this point. See, 403 U.S., at 682–684, 91 S.Ct., at 2097–2099 (plurality opinion); *id.,* at 692, 91 S.Ct., at 2102 (Douglas, J., joined by Black and Marshall, JJ., concurring in part and dissenting in part); *Lemon v. Kurtzman,* 403 U.S. 602, 659–661, 91 S.Ct. 2125, 2134–2135, 29 L.Ed.2d 745 (1971) (opinion of Brennan, J.); *id.,* at 665, n. 1, 91 S.Ct., at 2137, n. 1 (opinion of White, J.).

Bowen involved consideration of the Adolescent Family Life Act (AFLA), a federal grant program providing funds to institutions for counseling and educational services related to adolescent sexuality and pregnancy. At the time of the litigation, 141 grants had been awarded under the AFLA to ***883** a broad array of both secular and religiously affiliated institutions. *Id.,* at 597, 108 S.Ct., at 2567–2568. In an Establishment Clause challenge to the Act brought by taxpayers and other interested parties, the District Court resolved the case on a pretrial motion for summary judgment, holding the AFLA program unconstitutional both on its face and also insofar as religious institutions were involved in receiving grants under the Act. When this Court reversed on the issue of facial constitutionality under the Establishment Clause, *id.,* at 602–618, 108 S.Ct., at 2570–2579, we said that there was "no intimation in the statute that at some point, or for some grantees, religious uses are permitted." *Id.,* at 614, 108 S.Ct., at 2577. On the contrary, after looking at the legislative history and applicable regulations, we found safeguards adequate to ensure that grants would not be "used by ... grantees in such a way as to advance religion." *Id.,* at 615, 108 S.Ct., at 2577.

With respect to the claim that the program was unconstitutional as applied, we remanded the case to the District Court "for consideration of the evidence presented by appellees insofar as it sheds light on the manner in which the statute is presently being administered." *Id.,* at 621, 108 S.Ct., at 2580. Specifically, we told the District Court, on remand, to "consider ... whether in particular cases AFLA aid has been used to fund 'specifically religious activit[ies] in an otherwise substantially secular setting.' " *Ibid.,* quoting *Hunt v. McNair,* 413 U.S., at 743, 93 S.Ct., at 2874. In giving additional guidance to the District Court, we suggested that application of the Act would be unconstitutional if it turned out that aid recipients were using materials "that have an explicitly religious content or are designed to inculcate the views of a particular religious faith." *Bowen,* 487 U.S., at 621, 108 S.Ct., at 2580. At no point in our opinion did we suggest that the breadth of potential recipients, or distribution on an evenhanded basis, could have justified the use of federal funds for religious activities, a position that would have made no sense after we had pegged the Act's facial constitutionality to our conclusion that advancement of religion was not inevitable. Justice O'CONNOR's separate ***884** opinion in the case underscored just this point: "I fully agree ... that '[p]ublic funds may not be used to endorse the religious message.' [487 U.S.,] at 642, 108 S.Ct., at 2591–2592 [(Blackmun, J., dissenting)].... [*A*]*ny* use of public funds to promote religious doctrines violates the Establishment Clause." *Id.,* at 622–623, 108 S.Ct., at 2581–582 (concurring opinion) (emphasis in original).

Bowen was no sport; its pedigree was the line of *Everson v. Board of Ed.,* 330 U.S., at 16–18, 67 S.Ct., at 511–513, *Board of Ed. v. Allen,* 392 U.S., at 243–249, 88 S.Ct., at 1926–1930, *Tilton v. Richardson, supra,* 403 U.S., at 678–682, 91 S.Ct., at 2095–2098, *Hunt v. McNair, supra,* 413 U.S., at 742–745, 93 S.Ct., at 2873–2875, and *Roemer v. Board of Public Works of Md.,* 426 U.S., at 759–761, 96 S.Ct., at 2351–2352. Each of these cases involved a general aid program that provided benefits to a broad array of secular and sectarian institutions on an evenhanded basis, but in none of them was that fact dispositive. The plurality opinion in *Roemer* made this point exactly:

> "The Court has taken the view that a secular purpose and a facial neutrality may not be enough, if in fact the

State is lending direct support to a religious activity. The State may not, for example, pay for what is actually a religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious institutions alike." 426 U.S., at 747, 96 S.Ct., at 2345 (opinion of Blackmun, J.).

Instead, the central enquiry in each of these general aid cases, as in *Bowen,* was whether ****2544** secular activities could be separated from the sectarian ones sufficiently to ensure that aid would flow to the secular alone.

Witters, Mueller, and *Zobrest* expressly preserve the standard thus exhibited so often. Each of these cases explicitly distinguished the indirect aid in issue from contrasting examples in the line of cases striking down direct aid, and each thereby expressly preserved the core constitutional principle that direct aid to religion is impermissible. See *Zobrest,* 509 U.S., at 11–13, 113 S.Ct., at 2468–2469 (distinguishing *Meek v. Pittenger,* 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975), and *School Dist. v. Ball,* 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985), and noting that " '[t]he State may not grant aid to a ***885** religious school, whether cash or in kind, where the effect of the aid is "that of a direct subsidy to the religious school" ' ") (quoting *Witters,* 474 U.S., at 487, 106 S.Ct., at 751); see also *ibid.; Mueller,* 463 U.S., at 399, 103 S.Ct., at 3069. It appears that the University perfectly understood the primacy of the no-direct-funding rule over the evenhandedness principle when it drew the line short of funding "an[y] activity which primarily promotes or manifests a particular belief(s) in or about a deity or an ultimate reality." [9] App. to Pet. for Cert. 66a.

9 Congress apparently also reads our cases as the University did, for it routinely excludes religious activities from general funding programs. See, *e.g.,* 20 U.S.C. § 1062(b) (federal grant program for institutions of higher education; "[n]o grant may be made under this chapter for any educational program, activity, or service related to sectarian instruction or religious worship, or provided by a school or department of divinity"); 20 U.S.C. § 1069c (certain grants to higher education institutions "may not be used ... for a school or department of divinity or any religious worship or sectarian activity ..."); 20 U.S.C. § 1132c–3(c) (1988 ed., Supp. V) (federal assistance for renovation of certain academic facilities; "[n]o loan may be made under this part for any educational program, activity or service related to sectarian instruction or religious worship or provided by a school or department of divinity or to an institution in which a substantial portion of its functions is subsumed in a religious mission"); 20 U.S.C. § 1132i(c) (grant program for educational facilities; "no project assisted with funds under this subchapter shall ever be used for religious worship or a sectarian activity or for a school or department of divinity"); 20 U.S.C. § 1213d ("No grant may be made under this chapter for any educational program, activity, or service related to sectarian instruction or religious worship, or provided by a school or department of divinity"); 25 U.S.C. § 3306(a) (1988 ed., Supp. V) (funding for Indian higher education programs; "[n]one of the funds made available under this subchapter may be used for study at any school or department of divinity or for any religious worship or sectarian activity"); 29 U.S.C. § 776(g) (grants for projects and activities for rehabilitation of handicapped persons; "[n]o funds provided under this subchapter may be used to assist in the construction of any facility which is or will be used for religious worship or any sectarian activity"); 42 U.S.C. § 3027(a)(14)(A)(iv) (1988 ed. and Supp. V) (requiring States seeking federal aid for construction of centers for the elderly to submit plans providing assurances that "the facilit[ies] will not be used and [are] not intended to be used for sectarian instruction or as ... place[s] for religious worship"); 42 U.S.C. § 5001(a)(2) (1988 ed., Supp. V) (federal grants to support volunteer projects for the elderly, but not including "projects involving the construction, operation, or maintenance of so much of any facility used or to be used for sectarian instruction or as a place for religious worship"); 42 U.S.C. § 9858k(a) (1988 ed., Supp. V) (no child care and development block grants "shall be expended for any sectarian purpose or activity, including sectarian worship or instruction").

***886** C

Since conformity with the marginal or limiting principle of evenhandedness is insufficient of itself to demonstrate the constitutionality of providing a government benefit that reaches religion, the Court must identify some further element in the funding scheme that does demonstrate its permissibility. For one reason or another, the Court's chosen element appears to be the fact that under the University's Guidelines, funds are sent to the printer

chosen by Wide Awake, rather than to Wide Awake itself. *Ante,* at 2523–2524.

1

If the Court's suggestion is that this feature of the funding program brings this case into line with *Witters, Mueller,* and *Zobrest* (discussed *supra,* at 2541–2542), the Court has misread those cases, which turned on the fact that the choice to benefit religion was made by a nonreligious third party standing between the government and a religious institution. See *Witters, supra,* 474 U.S., at 487, 106 S.Ct., at 751; see also ****2545** *Mueller, supra,* 463 U.S., at 399–400, 103 S.Ct., at 3069–3070; *Zobrest, supra,* 509 U.S., at 8–13, 113 S.Ct., at 2466–2469. Here there is no third party standing between the government and the ultimate religious beneficiary to break the circuit by its independent discretion to put state money to religious use. The printer, of course, has no option to take the money and use it to print a secular journal instead of Wide Awake. It only gets the money because of its contract to print a message of religious evangelism at the direction of Wide Awake, and it will receive payment only for doing precisely that. The formalism of distinguishing between payment to Wide Awake so it can pay an approved bill and payment of the approved bill itself cannot be the basis of a decision of constitutional law. If ***887** this indeed were a critical distinction, the Constitution would permit a State to pay all the bills of any religious institution;[10] in fact, despite the Court's purported adherence to the no-direct-funding principle, the State could simply hand out credit cards to religious institutions and honor the monthly statements (so long as someone could devise an evenhanded umbrella to cover the whole scheme). *Witters* and the other cases cannot be distinguished out of existence this way.

10 The Court acknowledges that "if the State pays a church's bills it is subsidizing it," and concedes that "we must guard against this abuse." *Ante,* at 2524. These concerns are not present here, the Court contends, because Wide Awake "is not a religious institution, at least in the usual sense of that term as used in our case law." *Ibid.* The Court's concession suggests that its distinction between paying a religious institution and paying a religious institution's bills is not really significant. But if the Court is relying on its characterization of Wide Awake as not a religious institution, "at least in the usual sense," the Court could presumably stop right there.

2

It is more probable, however, that the Court's reference to the printer goes to a different attempt to justify the payment. On this purported justification, the payment to the printer is significant only as the last step in an argument resting on the assumption that a public university may give a religious group the use of any of its equipment or facilities so long as secular groups are likewise eligible. The Court starts with the cases of *Widmar v. Vincent,* 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens,* 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990), and *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993), in which religious groups were held to be entitled to access for speaking in government buildings open generally for that purpose. The Court reasons that the availability of a forum has economic value (the government built and maintained the building, while the speakers saved the rent for a hall); and that economically there is no difference between ***888** the University's provision of the value of the room and the value, say, of the University's printing equipment; and that therefore the University must be able to provide the use of the latter. Since it may do that, the argument goes, it would be unduly formalistic to draw the line at paying for an outside printer, who simply does what the magazine's publishers could have done with the University's own printing equipment. *Ante,* at 2523–2524.

The argument is as unsound as it is simple, and the first of its troubles emerges from an examination of the cases relied upon to support it. The common factual thread running through *Widmar, Mergens,* and *Lamb's Chapel,* is that a governmental institution created a limited forum for the use of students in a school or college, or for the public at large, but sought to exclude speakers with religious messages. See generally *Perry Ed. Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 45–46, 103 S.Ct. 948, 954–955, 74 L.Ed.2d 794 (1983) (forum analysis). In each case the restriction was struck down either as an impermissible attempt to regulate the content of speech in an open forum (as in *Widmar* and *Mergens*) or to suppress a particular religious viewpoint (as in *Lamb's Chapel,* see *infra,* at 2550–2551). In each case, to be sure,

the religious speaker's use of the room passed muster as an incident of a plan to facilitate speech generally for a secular purpose, entailing neither secular entanglement with religion nor risk that the religious speech would be taken to be the speech of the government or that the government's ****2546** endorsement of a religious message would be inferred. But each case drew ultimately on unexceptionable Speech Clause doctrine treating the evangelist, the Salvation Army, the millennialist, or the Hare Krishna like any other speaker in a public forum. It was the preservation of free speech on the model of the street corner that supplied the justification going beyond the requirement of evenhandedness.

The Court's claim of support from these forum-access cases is ruled out by the very scope of their holdings. While ***889** they do indeed allow a limited benefit to religious speakers, they rest on the recognition that all speakers are entitled to use the street corner (even though the State paves the roads and provides police protection to everyone on the street) and on the analogy between the public street corner and open classroom space. Thus, the Court found it significant that the classroom speakers would engage in traditional speech activities in these forums, too, even though the rooms (like street corners) require some incidental state spending to maintain them. The analogy breaks down entirely, however, if the cases are read more broadly than the Court wrote them, to cover more than forums for literal speaking. There is no traditional street corner printing provided by the government on equal terms to all comers, and the forum cases cannot be lifted to a higher plane of generalization without admitting that new economic benefits are being extended directly to religion in clear violation of the principle barring direct aid. The argument from economic equivalence thus breaks down on recognizing that the direct state aid it would support is not mitigated by the street corner analogy in the service of free speech. Absent that, the rule against direct aid stands as a bar to printing services as well as printers.

3

It must, indeed, be a recognition of just this point that leads the Court to take a third tack, not in coming up with yet a third attempt at justification within the rules of existing case law, but in recasting the scope of the Establishment Clause in ways that make further affirmative justification unnecessary. Justice O'CONNOR makes a comprehensive analysis of the manner in which the activity fee is assessed and distributed. She concludes that the funding differs so sharply from religious funding out of governmental treasuries generally that it falls outside Establishment Clause's purview in the absence of a message of religious endorsement (which she finds not to be present). *Ante,* at 2526–2528 (concurring ***890** opinion). The opinion of the Court concludes more expansively that the activity fee is not a tax, and then proceeds to find the aid permissible on the legal assumption that the bar against direct aid applies only to aid derived from tax revenue. I have already indicated why it is fanciful to treat the fee as anything but a tax, *supra,* at 2538, and n. 3; see also *ante,* at 2522 (noting mandatory nature of the fee), and will not repeat the point again. The novelty of the assumption that the direct aid bar only extends to aid derived from taxation, however, requires some response.

Although it was a taxation scheme that moved Madison to write in the first instance, the Court has never held that government resources obtained without taxation could be used for direct religious support, and our cases on direct government aid have frequently spoken in terms in no way limited to tax revenues. *E.g., School Dist. v. Ball,* 473 U.S., at 385, 105 S.Ct., at 3223 ("Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith"); *Nyquist,* 413 U.S., at 780, 93 S.Ct., at 2969 ("In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid"); *id.,* at 772, 93 S.Ct., at 2965 ("Primary among those evils" against which the Establishment Clause guards "have been sponsorship, financial support, and active involvement of the sovereign in religious activity") (citations and internal quotation marks omitted); see also T. Curry, The First Freedoms 217 (1986) (At the time ****2547** of the framing of the Bill of Rights, "[t]he belief that government assistance to religion, especially in the form of taxes, violated religious liberty had a long history").

Allowing nontax funds to be spent on religion would, in fact, fly in the face of clear principle. Leaving entirely aside the question whether public nontax revenues could ever be used to finance religion without violating the

endorsement ***891** test, see *County of Allegheny v. American Civil Liberties Union,* 492 U.S., at 593–594, 109 S.Ct., at 3100–3101, any such use of them would ignore one the dual objectives of the Establishment Clause, which was meant not only to protect individuals and their republics from the destructive consequences of mixing government and religion, but to protect religion from a corrupting dependence on support from the Government. *Engel v. Vitale,* 370 U.S. 421, 431, 82 S.Ct. 1261, 1267, 8 L.Ed.2d 601 (1962) (the Establishment Clause's "first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion"); *Everson,* 330 U.S., at 53, 67 S.Ct., at 529–530 (Rutledge, J., dissenting) ("The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state. For when it comes to rest upon that secular foundation it vanishes with the resting") (citing Madison's Remonstrance ¶¶ 7, 8, reprinted in *Everson, supra,* at 63–72, 67 S.Ct., at 534–539 (appendix to dissent of Rutledge, J.)); *School Dist. of Abington Township v. Schempp,* 374 U.S. 203, 259, 83 S.Ct. 1560, 1591, 10 L.Ed.2d 844 (1963) (Brennan, J., concurring) ("It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government") (footnote omitted); Jefferson, A Bill for Establishing Religious Freedom, reprinted in 5 The Founder's Constitution, at 84–85. Since the corrupting effect of government support does not turn on whether the Government's own money comes from taxation or gift or the sale of public lands, the Establishment Clause could hardly relax its vigilance simply because tax revenue was not implicated. Accordingly, in the absence of a forthright disavowal, one can only assume that the Court does not mean to eliminate one half of the Establishment Clause's justification.

D

Nothing in the Court's opinion would lead me to end this enquiry into the application of the Establishment Clause any ***892** differently from the way I began it. The Court is ordering an instrumentality of the State to support religious evangelism with direct funding. This is a flat violation of the Establishment Clause.

II

Given the dispositive effect of the Establishment Clause's bar to funding the magazine, there should be no need to decide whether in the absence of this bar the University would violate the Free Speech Clause by limiting funding as it has done. *Widmar,* 454 U.S., at 271, 102 S.Ct., at 275 (university's compliance with its Establishment Clause obligations can be a compelling interest justifying speech restriction). But the Court's speech analysis may have independent application, and its flaws should not pass unremarked.

The Court acknowledges, *ante,* at 2518, the necessity for a university to make judgments based on the content of what may be said or taught when it decides, in the absence of unlimited amounts of money or other resources, how to honor its educational responsibilities. *Widmar, supra,* at 276, 102 S.Ct., at 277–278; cf. *Perry,* 460 U.S., at 49, 103 S.Ct., at 957 (subject matter and speaker identity distinctions "are inherent and inescapable in the process of limiting a non-public forum to activities compatible with the intended purpose of the property"). Nor does the Court generally question that in allocating public funds a state university enjoys spacious discretion. Cf. *Rust v. Sullivan,* 500 U.S. 173, 194, 111 S.Ct. 1759, 1773, 114 L.Ed.2d 233 (1991) ("[W]hen the government appropriates public funds to establish a program it is entitled to define the limits of that program"); *Regan v. Taxation* ****2548** *with Representation of Wash.,* 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983) (upholding government subsidization decision partial to one class of speaker).[11] Accordingly, ***893** the Court recognizes that the relevant enquiry in this case is not merely whether the University bases its funding decisions on the subject matter of student speech; if there is an infirmity in the basis for the University's funding decision, it must be that the University is impermissibly distinguishing among competing viewpoints, *ante,* at 2516–2517, citing, *inter alia, Perry, supra,* at 46, 103 S.Ct., at 957; see also *Lamb's Chapel,* 508 U.S., at 392–393, 113 S.Ct., at 2146–2147 (subject-matter distinctions permissible in controlling access to limited public forum if reasonable and viewpoint neutral); *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.,* 473 U.S. 788, 806, 105 S.Ct. 3439, 3451, 87 L.Ed.2d 567 (1985) (similar); *Regan, supra,* at 548, 103 S.Ct., at 2002.[12]

11 The Court draws a distinction between a State's use of public funds to advance its own speech and the State's funding of private speech, suggesting that authority to make content-related choices is at its most powerful when the State undertakes the former. *Ante,* at 2518–2519. I would not argue otherwise, see *Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260, 270–273, 108 S.Ct. 562, 569–571, 98 L.Ed.2d 592 (1988), but I do suggest that this case reveals the difficulties that can be encountered in drawing this distinction. There is a communicative element inherent in the very act of funding itself, cf. *Buckley v. Valeo,* 424 U.S. 1, 15–19, 96 S.Ct. 612, 632–635, 46 L.Ed.2d 659 (1976) (*per curiam*), and although it is the student speakers who choose which particular messages to advance in the forum created by the University, the initial act of defining the boundaries of the forum is a decision attributable to the University, not the students. In any event, even assuming that private and state speech always may be separated by clean lines and that this case involves only the former, I believe the distinction is irrelevant here because, as is discussed *infra,* this case does not involve viewpoint discrimination.

12 I do not decide that all viewpoint discrimination in a public university's funding determinations would violate the Free Speech Clause. If, however, the determinations are made on the basis of a reasonable subject-matter distinction, but not on a viewpoint distinction, there is no violation. In a limited-access forum, a speech restriction must be " 'reasonable in light of the purpose served by the forum' " as well as viewpoint neutral. *E.g., Lamb's Chapel,* 508 U.S., at 392–393, 113 S.Ct., at 2147, quoting *Cornelius,* 473 U.S., at 806, 105 S.Ct., at 3439. Because petitioners have not challenged the University's Guideline as unreasonable, I express no opinion on that or on the question whether the reasonableness criterion applies in speech funding cases in the same manner that it applies in limited-access forum cases.

The issue whether a distinction is based on viewpoint does not turn simply on whether a government regulation happens to be applied to a speaker who seeks to advance a particular viewpoint; the issue, of course, turns on whether the burden on speech is explained by reference to viewpoint. See *Cornelius, supra,* at 806, 105 S.Ct., at 3439 ("[T]he government violates the First Amendment when it denies access to a speaker solely ***894** to suppress the point of view he espouses on an otherwise includible subject"). As when deciding whether a speech restriction is content based or content neutral, "[t]he government's purpose is the controlling consideration." *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 2754, 105 L.Ed.2d 661 (1989); see also *ibid.* (content neutrality turns on, *inter alia,* whether a speech restriction is "justified without reference to the content of the regulated speech") (internal quotation marks and citations omitted) (emphasis deleted). So, for example, a city that enforces its excessive noise ordinance by pulling the plug on a rock band using a forbidden amplification system is not guilty of viewpoint discrimination simply because the band wishes to use that equipment to espouse antiracist views. Accord, *Rock Against Racism, supra.* Nor does a municipality's decision to prohibit political advertising on bus placards amount to viewpoint discrimination when in the course of applying this policy it denies space to a person who wishes to speak in favor of a particular political candidate. Accord, *Lehman v. Shaker Heights,* 418 U.S. 298, 304, 94 S.Ct. 2714, 2717–2718, 41 L.Ed.2d 770 (1974) (plurality opinion).

Accordingly, the prohibition on viewpoint discrimination serves that important purpose of the Free Speech Clause, which is to bar the government from skewing public debate. Other things being equal, viewpoint discrimination occurs when government allows one message while prohibiting the messages of ****2549** those who can reasonably be expected to respond. See *First Nat. Bank of Boston v. Bellotti,* 435 U.S. 765, 785–786, 98 S.Ct. 1407, 1420–1421, 55 L.Ed.2d 707 (1978) ("Especially where ... the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended") (footnote omitted); *Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n,* 429 U.S. 167, 175–176, 97 S.Ct. 421, 426, 50 L.Ed.2d 376 (1976) ("to permit one side of a debatable public question to have a monopoly in expressing its views ... is the antithesis of constitutional guarantees") (footnote omitted); ***895** *United States v. Kokinda,* 497 U.S. 720, 736, 110 S.Ct. 3115, 3124, 111 L.Ed.2d 571 (1990) (viewpoint discrimination involves an "inten[t] to discourage one viewpoint and advance another") (plurality opinion) (citations and internal quotation marks omitted). It is precisely this element of taking sides in a public debate that identifies viewpoint discrimination and makes it the most pernicious of all distinctions based on content. Thus, if government assists those espousing one point of view, neutrality requires it to assist those espousing opposing points of view, as well.

There is no viewpoint discrimination in the University's application of its Guidelines to deny funding to Wide Awake. Under those Guidelines, a "religious activit[y]," which is not eligible for funding, App. to Pet. for Cert. 62a, is "an activity which primarily promotes or manifests a particular belief(s) in or about a deity or an ultimate reality," id., at 66a. It is clear that this is the basis on which Wide Awake Productions was denied funding. Letter from Student Council to Ronald W. Rosenberger, App. 54 ("In reviewing the request by Wide Awake Productions, the Appropriations Committee determined your organization's request could not be funded as it is a religious activity"). The discussion of Wide Awake's content, *supra,* at 2534–2536, shows beyond any question that it "primarily promotes or manifests a particular belief(s) in or about a deity ...," in the very specific sense that its manifest function is to call students to repentance, to commitment to Jesus Christ, and to particular moral action because of its Christian character.

If the Guidelines were written or applied so as to limit only such Christian advocacy and no other evangelical efforts that might compete with it, the discrimination would be based on viewpoint. But that is not what the regulation authorizes; it applies to Muslim and Jewish and Buddhist advocacy as well as to Christian. And since it limits funding to activities promoting or manifesting a particular belief not only "in" but "about" a deity or ultimate reality, it applies to agnostics and atheists as well as it does to deists and theists ***896** as the University maintained at oral argument, Tr. of Oral Arg. 18–19, and as the Court recognizes, see *ante,* at 2520). The Guidelines, and their application to Wide Awake, thus do not skew debate by funding one position but not its competitors. As understood by their application to Wide Awake, they simply deny funding for hortatory speech that "primarily promotes or manifests" any view on the merits of religion; they deny funding for the entire subject matter of religious apologetics.

The Court, of course, reads the Guidelines differently, but while I believe the Court is wrong in construing their breadth, the important point is that even on the Court's own construction the Guidelines impose no viewpoint discrimination. In attempting to demonstrate the potentially chilling effect such funding restrictions might have on learning in our Nation's universities, the Court describes the Guidelines as "a sweeping restriction on student thought and student inquiry," disentitling a vast array of topics to funding. *Ante,* at 2520. As the Court reads the Guidelines to exclude "any writing that is explicable as resting upon a premise which presupposes the existence of a deity or ultimate reality," as well as "those student journalistic efforts which primarily manifest or promote a belief that there is no deity and no ultimate reality," the Court concludes that the major works of writers from Descartes to Sartre would be barred from the funding forum. *Ibid.* The Court goes so far as to suggest that the Guidelines, properly interpreted, tolerate nothing much more than essays ****2550** on "making pasta or peanut butter cookies." *Ante,* at 2520.

Now, the regulation is not so categorically broad as the Court protests. The Court reads the word "primarily" ("primarily promotes or manifests a particular belief(s) in or about a deity or an ultimate reality") right out of the Guidelines, whereas it is obviously crucial in distinguishing between works characterized by the evangelism of Wide Awake and writing that merely happens to express views that a given religion might approve, or simply descriptive ***897** writing informing a reader about the position of a given religion. But, as I said, that is not the important point. Even if the Court were indeed correct about the funding restriction's categorical breadth, the stringency of the restriction would most certainly not work any impermissible viewpoint discrimination under any prior understanding of that species of content discrimination. If a university wished to fund no speech beyond the subjects of pasta and cookie preparation, it surely would not be discriminating on the basis of someone's viewpoint, at least absent some controversial claim that pasta and cookies did not exist. The upshot would be an instructional universe without higher education, but not a universe where one viewpoint was enriched above its competitors.

The Guidelines are thus substantially different from the access restriction considered in *Lamb's Chapel,* the case upon which the Court heavily relies in finding a viewpoint distinction here, *ante,* at 2517–2518. *Lamb's Chapel* addressed a school board's regulation prohibiting the after-hours use of school premises "by any group for religious purposes," even though the forum otherwise was open for a variety of social, civic, and recreational purposes. 508 U.S., at 387, 113 S.Ct., at 2144 (citation and internal quotation marks omitted). "Religious" was

understood to refer to the viewpoint of a believer, and the regulation did not purport to deny access to any speaker wishing to express a non-religious or expressly antireligious point of view on any subject, see *ibid.* ("The issue in this case is whether ... it violates the Free Speech Clause of the First Amendment ... to deny a church access to school premises to exhibit for public viewing and for assertedly religious purposes, a film series dealing with family and child-rearing issues"); *id.,* at 394, 113 S.Ct., at 2147–2448, citing *May v. Evansville–Vanderburgh School Corp.,* 787 F.2d 1105, 1114 (CA7 1986). [13]

13 See also Tr. of Oral Arg. in *Lamb's Chapel v. Center Moriches Union Free School Dist.,* O.T. 1992, No. 91–2024, where counsel for the school district charged with enforcing the restriction unequivocally admitted that anyone with an atheistic or antireligious message would be permitted to use school property under the rules of the forum. *Id.,* at 47, 57–58. The complete exchange during the oral argument in *Lamb's Chapel* went as follows:

> "QUESTION: But do I understand your statement you made earlier that supposing you had a communist group that wanted to address the subject of family values and they thought there was a value in not having children waste their time going to Sunday school or church and therefore they had a point of view that was definitely antireligious, they would be permitted, under your policy, to discuss family values in that context?
>
> "[COUNSEL]: Yes. Yes, Your Honor, that's correct.

. . . . .

> "QUESTION: Counsel, in your earlier discussions with [the Court] you indicated that communists would be able to give their perspective on family. I —I assume from that that atheists would be able to give theirs under your rules.
>
> "[COUNSEL]: Yes, Your Honor."

***898** With this understanding, it was unremarkable that in *Lamb's Chapel* we unanimously determined that the access restriction, as applied to a speaker wishing to discuss family values from a Christian perspective, impermissibly distinguished between speakers on the basis of viewpoint. See *Lamb's Chapel, supra,* at 393–394, 113 S.Ct., at 2147–2748 (considering as-applied challenge only). Equally obvious is the distinction between that case and this one, where the regulation is being applied, not to deny funding for those who discuss issues in general from a religious viewpoint, but to those engaged in promoting or opposing religious conversion and religious observances as such. If this amounts to viewpoint discrimination, the Court has all ****2551** but eviscerated the line between viewpoint and content.

To put the point another way, the Court's decision equating a categorical exclusion of both sides of the religious debate with viewpoint discrimination suggests the Court has concluded that primarily religious and antireligious speech, grouped together, always provides an opposing (and not merely a related) viewpoint to any speech about any secular topic. Thus, the Court's reasoning requires a university that funds private publications about any primarily nonreligious ***899** topic also to fund publications primarily espousing adherence to or rejection of religion. But a university's decision to fund a magazine about racism, and not to fund publications aimed at urging repentance before God does not skew the debate either about racism or the desirability of religious conversion. The Court's contrary holding amounts to a significant reformulation of our viewpoint discrimination precedents and will significantly expand access to limited-access forums. See *Greer v. Spock,* 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976) (upholding regulation prohibiting political speeches on military base); *Cornelius,* 473 U.S., at 812, 105 S.Ct., at 3454 (exclusion from fundraising drive of political activity or advocacy groups is facially viewpoint neutral despite inclusion of charitable, health, and welfare agencies); *Perry,* 460 U.S., at 49–50, and n. 9, 103 S.Ct., at 957–958, and n. 9 (ability of teachers' bargaining representative to use internal school mail system does not require that access be provided to "any other citizen's group or community organization with a message for school personnel"); *Lehman,* 418 U.S., at 304, 94 S.Ct., at 2718 (exclusion of political messages from forum permissible despite ability of nonpolitical speakers to use the forum).

III

Since I cannot see the future I cannot tell whether today's decision portends much more than making a shambles out of student activity fees in public colleges. Still, my apprehension is whetted by Chief Justice Burger's warning in *Lemon v. Kurtzman,* 403 U.S. 602, 624, 91 S.Ct. 2105, 2116, 29 L.Ed.2d 745 (1971): "in constitutional adjudication some steps, which when taken were thought to approach 'the verge,' have become the platform for

yet further steps. A certain momentum develops in constitutional theory and it can be a 'downhill thrust' easily set in motion but difficult to retard or stop."

I respectfully dissent.

All Citations

515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700, 63 USLW 4702, 101 Ed. Law Rep. 552, 95 Daily Journal D.A.R. 8512, 95 Daily Journal D.A.R. 8513, 95 Daily Journal D.A.R. 8520, 95 Daily Journal D.A.R. 8523, 95 Daily Journal D.A.R. 8526

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Abrogation Recognized by Richmond Medical Center for Women v. Gilmore, E.D.Va., July 16, 1999

111 S.Ct. 1759
Supreme Court of the United States

Irving RUST, etc., et al., Petitioners,
v.
Louis W. SULLIVAN, Secretary of Health and Human Services.
NEW YORK, et al., Petitioners,
v.
Louis W. SULLIVAN, Secretary of Health and Human Services.

Nos. 89–1391, 89–1392.
|
Argued Oct. 30, 1990.
|
Decided May 23, 1991.

Synopsis

Recipients of family planning funds under Title X of the Public Health Service Act and doctors who supervised Title X funds brought two suits challenging regulations of the Department of Health and Human Services (HHS) which prohibit Title X projects from engaging in abortion counseling, referral, and activities advocating abortion as a method of family planning. Plaintiffs also challenged provisions of regulations requiring such projects to maintain an objective integrity and independence from prohibited abortion activities by the use of separate facilities, personnel, and accounting records. After consolidation of suits, the United States District Court for the Southern District of New York, 690 F.Supp.1261, upheld the regulations, and plaintiffs appealed. The Court of Appeals for the Second Circuit, 889 F.2d 401, affirmed, and plaintiffs sought certiorari. The Supreme Court, Chief Justice Rehnquist, held that: (1) regulations were based on permissible construction of statute prohibiting use of Title X funds in programs in which abortion is a method of family planning; (2) regulations do not violate First Amendment free speech rights of Title X fund recipients, their staffs, or their patients by impermissibly imposing viewpoint-discriminatory conditions on government subsidies; and (3) regulations do not violate a woman's Fifth Amendment right to choose whether to terminate a pregnancy, and do not impermissibly infringe on doctor-patient relationship.

Affirmed.

Justice Blackmun filed a dissenting opinion in which Justice Marshall joined and in which Justice Stevens and Justice O'Connor joined in part.

Justice Stevens and Justice O'Connor filed dissenting opinions.

West Headnotes (10)

[1] **Abortion and Birth Control**
Family planning;funding and services

4 Abortion and Birth Control
4k132 Contraceptives and Birth Control
4k138.5 Family planning;funding and services
(Formerly 356Ak4.6)

Statute prohibiting use of funds granted under Title X of the Public Health Service Act in programs in which abortion is a method of family planning is ambiguous with regard to issues of abortion counseling, referral, advocacy, or program integrity; thus, construction of statute by the Secretary of Health and Human Services (HHS) must be accorded substantial deference as the interpretation of agency charged with administering the statute, and may not be disturbed as an abuse of discretion if it reflects a plausible construction of statute's plain language and does not otherwise conflict with expressed intent of Congress. Public Health Service Act, §§ 1002, 1008, as amended, 42 U.S.C.A. §§ 300a, 300a–6.

138 Cases that cite this headnote

[2] **Abortion and Birth Control**
Family planning;funding and services

4 Abortion and Birth Control
4k132 Contraceptives and Birth Control
4k138.5 Family planning;funding and services
(Formerly 356Ak4.6)

Regulations of the Department of Health and Human Services (HHS) prohibiting grantees under Title X of the Public Health Service Act from engaging in abortion counseling, referral, and advocacy represent a permissible construction of statute prohibiting use of funds granted under Title X in programs in which abortion is a method of family planning. Public Health Service Act, §§ 1002, 1008, as amended, 42 U.S.C.A. §§ 300a, 300a–6.

6 Cases that cite this headnote

[3] **Administrative Law and Procedure**
Consistent or longstanding construction; approval or acquiescence

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules, Regulations, and Other Policymaking
15Ak428 Administrative Construction of Statutes
15Ak434 Consistent or longstanding construction;approval or acquiescence
(Formerly 361k219(1))

Because an agency must be given ample latitude to adapt its rules to changing circumstances, an agency's revised interpretation of a statute may deserve deference.

108 Cases that cite this headnote

[4] **Abortion and Birth Control**
Family planning;funding and services

4 Abortion and Birth Control
4k132 Contraceptives and Birth Control
4k138.5 Family planning;funding and services
(Formerly 356Ak4.6)

Regulations of the Department of Health and Human Services (HHS) prohibiting grantees of funds under Title X of the Public Health Service Act from engaging in abortion counseling, referral or advocacy were entitled to deference with regard to interpretation of statute prohibiting use of Title X funds in programs in which abortion is a method of family planning, notwithstanding claim that regulations reversed long-standing agency policy permitting nondirective counseling and referral for abortion; change of interpretation was amply supported by “reasoned analysis” indicating that new regulations were more in keeping with statute's original intent, were justified by client experience under prior policy, and accorded with shift in attitude against elimination of unborn children by abortion. Public Health Service Act, §§ 1002, 1008, as amended, 42 U.S.C.A. §§ 300a, 300a–6.

128 Cases that cite this headnote

[5] **Abortion and Birth Control**
Family planning;funding and services

4 Abortion and Birth Control
4k132 Contraceptives and Birth Control
4k138.5 Family planning;funding and services
(Formerly 356Ak4.6)

Regulations of the Department of Health and Human Services (HHS) which require grantees of funds under Title X of the Public Health Service Act to maintain an objective integrity and independence from prohibited abortion activities by the use of separate facilities, personnel, and accounting records are based on permissible construction of statute prohibiting use of Title X funds in programs in which abortion is a method of family planning. Public Health Service Act, §§ 1002, 1008, as amended, 42 U.S.C.A. §§ 300a, 300a–6.

10 Cases that cite this headnote

[6] **Abortion and Birth Control**
Family planning;funding and services
Constitutional Law
Government funding

4 Abortion and Birth Control
4k132 Contraceptives and Birth Control
4k138.5 Family planning;funding and services
(Formerly 356Ak4.6)
92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1571 Government funding
(Formerly 92k90.1(1))

Regulations of the Department of Health and Human Services (HHS) prohibiting recipients of funds under Title X of the Public Health Service Act from engaging in abortion counseling, referral, and provision of information regarding abortion as a method of family planning do not violate the First Amendment free speech rights of recipients, their staffs, or their patients by impermissibly imposing viewpoint-discriminatory conditions on government subsidies; in issuing regulations, government did not discriminate on basis of viewpoint; it merely chose to fund one activity to the exclusion of another; moreover, regulations simply ensure that appropriated funds are not used for activities, including speech, that are outside scope of federal program. U.S.C.A. Const.Amend. 1; Public Health Service Act, § 1008, as amended, 42 U.S.C.A. § 300a–6.

194 Cases that cite this headnote

[7] **Abortion and Birth Control**
Family planning;funding and services

4 Abortion and Birth Control
4k132 Contraceptives and Birth Control
4k138.5 Family planning;funding and services
(Formerly 356Ak4.6)

Regulations of the Department of Health and Human Services (HHS) prohibiting recipients of grants under Title X of the Public Health Service Act from engaging in abortion counseling, referral, and provision of information regarding abortion as a method of family planning do not, on their face, bar abortion referral or counseling where a woman's life is placed in imminent peril by her pregnancy, as such counseling could not be considered a "method of family planning" within meaning of statute; moreover, provisions of regulations themselves contemplate that a Title X recipient may engage in otherwise prohibited abortion-related activities in such circumstances. Public Health Service Act, §§ 1002, 1008, as amended, 42 U.S.C.A. §§ 300a, 300a–6.

9 Cases that cite this headnote

[8] **Abortion and Birth Control**
Family planning;funding and services
Constitutional Law
Government funding

4 Abortion and Birth Control
4k132 Contraceptives and Birth Control
4k138.5 Family planning;funding and services
(Formerly 356Ak4.6)
92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1571 Government funding
(Formerly 92k90.1(1))

Regulations of the Department of Health and Human Services (HHS) prohibiting recipients of funds under Title X of the Public Health Service Act from engaging in abortion counseling, referral, and activities advocating abortion as a method of family planning do not violate the First Amendment on theory that they condition receipt of a benefit, Title X funding, on relinquishment of a constitutional right, the First Amendment right to engage in abortion advocacy and counseling; regulations do not force Title X grantee, or its employees to give up abortion-related speech; they merely require that such activities be kept separate and distinct from activities of the Title X project. U.S.C.A. Const.Amend. 1; Public Health Service Act, §§ 1002, 1008, as amended, 42 U.S.C.A. §§ 300a, 300a–6.

89 Cases that cite this headnote

[9] **Abortion and Birth Control**
Family planning;funding and services
Constitutional Law
Abortion, Contraception, and Birth Control

4 Abortion and Birth Control
4k132 Contraceptives and Birth Control
4k138.5 Family planning;funding and services
(Formerly 356Ak4.6)
92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)22 Privacy and Sexual Matters
92k4451 Abortion, Contraception, and Birth Control
92k4452 In general
(Formerly 92k274(5))

Regulations of the Department of Health and Human Services (HHS) prohibiting recipients of funds under Title X of the Public Health Service Act from engaging in abortion counseling, referral, and activities advocating abortion as a method of family planning do not violate a woman's Fifth Amendment right to choose whether to terminate her pregnancy; government has no constitutional duty to subsidize an activity merely because it is constitutionally protected and may validly choose to allocate public funds for medical services relating to childbirth but not to abortion; such allocation places no government obstacle in path of woman wishing to terminate her pregnancy and leaves her with the same choices as if government has chosen not to fund family planning services at all. Public Health Service Act, §§ 1002, 1008, as amended, 42 U.S.C.A. §§ 300a, 300a–6; U.S.C.A. Const.Amend. 5.

44 Cases that cite this headnote

[10] **Abortion and Birth Control**
Family planning;funding and services
Constitutional Law
Abortion, Contraception, and Birth Control

4 Abortion and Birth Control
4k132 Contraceptives and Birth Control
4k138.5 Family planning;funding and services
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92XXVII(G)22 Privacy and Sexual Matters
92k4451 Abortion, Contraception, and Birth Control
92k4452 In general
(Formerly 92k274(5))

Regulations of the Department of Health and Human Services (HHS) prohibiting recipients of funds under Title X of the Public Health Service Act from engaging in abortion counseling, referral, and activities advocating abortion as method of family planning do not violate woman's Fifth Amendment right to medical self-determination and to make informed medical decisions free of government-imposed harm, on theory that they impermissibly infringe on doctor-patient relationship and deprive Title X clients of information concerning abortion as a method of family planning; doctor's ability to provide, and woman's right to receive, abortion-related information outside context of Title X project remains unfettered; moreover, fact that most Title X clients might be effectively precluded by indigency from seeking a health-care provider for abortion-related services did not change outcome, since financial constraints on woman's ability to enjoy full range of constitutionally protected freedom of choice were product not of governmental restrictions, but of her indigency. Public Health Service Act, §§ 1002, 1008, as amended, 42 U.S.C.A. §§ 300a, 300a–6; U.S.C.A. Const.Amend. 5.

86 Cases that cite this headnote

****1762** *Syllabus* [*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***173** Section 1008 of the Public Health Service Act specifies that none of the federal funds appropriated under the Act's Title X for family-planning services "shall be used in programs where abortion is a method

of family planning." In 1988, respondent Secretary of Health and Human Services issued new regulations that, *inter alia,* prohibit Title X projects from engaging in counseling concerning, referrals for, and activities advocating abortion as a method of family planning, and require such projects to maintain an objective integrity and independence from the prohibited abortion activities by the use of separate facilities, personnel, and accounting records. Before the regulations could be applied, petitioners—Title X grantees and doctors who supervise Title X funds—filed suits, which were consolidated, challenging the regulations' facial validity and seeking declaratory and injunctive relief to prevent their implementation. In affirming the District Court's grant of summary judgment to the Secretary, the Court of Appeals held that the regulations were a permissible construction of the statute and consistent with the First and Fifth Amendments.

Held:

1. The regulations are a permissible construction of Title X. Pp. 1767–1771.

(a) Because § 1008 is ambiguous in that it does not speak directly to the issues of abortion counseling, referral, and advocacy, or to "program integrity," the Secretary's construction must be accorded substantial deference as the interpretation of the agency charged with administering the statute, and may not be disturbed as an abuse of discretion if it reflects a plausible construction of the statute's plain language and does not otherwise conflict with Congress' expressed intent. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842–844, 104 S.Ct. 2778, 2781–2782, 81 L.Ed.2d 694. Pp. 1767–1768.

(b) Title X's broad language plainly allows the abortion counseling, referral, and advocacy regulations. Since the Title neither defines ***174** § 1008's "method of family planning" phrase nor enumerates what types of medical and counseling services are entitled to funding, it cannot be said that the Secretary's construction of the § 1008 prohibition to require a ban on such activities within Title X projects is impermissible. Moreover, since the legislative history is ambiguous as to Congress' intent on these issues, this Court will defer to the Secretary's expertise. Petitioners' contention, that the regulations are entitled to little or no deference because they reverse the Secretary's longstanding policy permitting nondirective counseling and referral for abortion, is rejected. Because an agency must be given ample latitude to adapt its rules to changing circumstances, a revised interpretation may deserve deference. The Secretary's change of interpretation is amply supported by a "reasoned analysis" indicating that the new regulations are more in keeping with the statute's original intent, are justified by client experience under the prior policy, and accord with a shift in attitude against the "elimination of unborn children by abortion." Pp. 1767–1769.

(c) The regulations' "program integrity" requirements are not inconsistent with Title X's plain language. The Secretary's view, that the requirements are necessary to ensure that Title X grantees apply federal funds only to authorized purposes and avoid creating the appearance of governmental support for abortion-related activities, is not unreasonable in light of § 1008's express prohibitory ****1763** language and is entitled to deference. Petitioners' contention is unpersuasive that the requirements frustrate Congress' intent, clearly expressed in the Act and the legislative history, that Title X programs be an integral part of a broader, comprehensive, health-care system that envisions the efficient use of non–Title X funds. The statements relied on are highly generalized and do not directly address the scope of § 1008 and, therefore, cannot form the basis for enjoining the regulations. Indeed, the legislative history demonstrates that Congress intended that Title X funds be kept separate and distinct from abortion-related activities. Moreover, there is no need to invalidate the regulations in order to save the statute from unconstitutionality, since petitioners' constitutional arguments do not carry the day. Pp. 1769–1771.

2. The regulations do not violate the First Amendment free speech rights of private Title X fund recipients, their staffs, or their patients by impermissibly imposing viewpoint-discriminatory conditions on Government subsidies. There is no question but that § 1008's prohibition is constitutional, since the Government may make a value judgment favoring childbirth over abortion and implement that judgment by the allocation of public funds. *Maher v. Roe,* 432 U.S. 464, 474, 97 S.Ct. 2376, 2382, 53 L.Ed.2d 484. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of another. Similarly, ***175** in implementing the statutory prohibition by forbidding counseling, referral, and the

provision of information regarding abortion as a method of family planning, the regulations simply ensure that appropriated funds are not used for activities, including speech, that are outside the federal program's scope. *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209, distinguished. Petitioners' view that if the Government chooses to subsidize one protected right, it must subsidize analogous counterpart rights, has been soundly rejected. See, *e.g., Regan v. Taxation with Representation of Wash.,* 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129. On their face, the regulations cannot be read, as petitioners contend, to bar abortion referral or counseling where a woman's life is placed in imminent peril by her pregnancy, since it does not seem that such counseling could be considered a "method of family planning" under § 1008, and since provisions of the regulations themselves contemplate that a Title X project could engage in otherwise prohibited abortion-related activities in such circumstances. Nor can the regulations' restrictions on the subsidization of abortion-related speech be held to unconstitutionally condition the receipt of a benefit, Title X funding, on the relinquishment of a constitutional right, the right to engage in abortion advocacy and counseling. The regulations do not force the Title X *grantee,* or its employees, to give up abortion-related speech; they merely require that such activities be kept separate and distinct from the activities of the Title X *project. FCC v. League of Women Voters of Cal.,* 468 U.S. 364, 400, 104 S.Ct. 3106, 3127, 82 L.Ed.2d 278; *Regan, supra,* 461 U.S., at 546, 103 S.Ct., at 2001, distinguished. Although it could be argued that the traditional doctor-patient relationship should enjoy First Amendment protection from Government regulation, even when subsidized by the Government, cf., *e.g., United States v. Kokinda,* 497 U.S. 720, 726, 110 S.Ct. 3115, 3119, 111 L.Ed.2d 571, that question need not be resolved here, since the Title X program regulations do not significantly impinge on the doctor-patient relationship. Pp. 1771–1776.

3. The regulations do not violate a woman's Fifth Amendment right to choose whether to terminate her pregnancy. The Government has no constitutional duty to subsidize an activity merely because it is constitutionally protected and may validly choose to allocate public funds for medical services relating to childbirth but not to abortion. ****1764** *Webster v. Reproductive Health Services,* 492 U.S. 490, 510, 109 S.Ct. 3040, 3052, 106 L.Ed.2d 410. That allocation places no governmental obstacle in the path of a woman wishing to terminate her pregnancy and leaves her with the same choices as if the Government had chosen not to fund family-planning services at all. See, *e.g., Harris v. McRae,* 448 U.S. 297, 315, 317, 100 S.Ct. 2671, 2687, 2688, 65 L.Ed.2d 784; *Webster, supra,* 492 U.S. at 509, 109 S.Ct. at 3052. Nor do the regulations place restrictions on the patient-doctor dialogue which violate a woman's right to make an informed and voluntary choice under ***176** *Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687, and *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, 106 S.Ct. 2169, 90 L.Ed.2d 779. Unlike the laws invalidated in those cases, which required *all* doctors to provide *all* pregnant patients contemplating abortion with specific antiabortion information, here, a doctor's ability to provide, and a woman's right to receive, abortion-related information remains unfettered outside the context of the Title X project. The fact that most Title X clients may be effectively precluded by indigency from seeing a health-care provider for abortion-related services does not affect the outcome here, since the financial constraints on such a woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions, but of her indigency. *McRae, supra,* 448 U.S. at 316, 100 S.Ct., at 2687. Pp. 1776–1778.

889 F.2d 401 (C.A.2 1989), affirmed.

REHNQUIST, C.J., delivered the opinion of the Court, in which WHITE, SCALIA, KENNEDY, and SOUTER, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which MARSHALL, J., joined, in Parts II and III of which STEVENS, J., joined, and in Part I of which O'CONNOR, J., joined, *post*, p. 1778. STEVENS, J., *post*, p. 1786, and O'CONNOR, J., *post*, p. 1788, filed dissenting opinions.

Attorneys and Law Firms

Laurence H. Tribe argued the cause for petitioners in both cases. With him on the briefs for petitioners in No. 89-1391 were *Kathleen M. Sullivan, Rachael N. Pine, Janet Benshoof, Lynn Paltrow, Kathryn Kolbert, Steven R. Shapiro, Norman Siegel, Arthur Eisenberg, Roger K. Evans, Laurie R. Rockett,* and *Peter J. Rubin. Robert Abrams,* Attorney General of New York, *O. Peter Sherwood,* Solicitor General, *Suzanne M. Lynn* and

Sanford M. Cohen, Assistant Attorneys General, *Victor A. Kovner, Leonard J. Koerner, Lorna Bade Goodman, Gail Rubin,* and *Hillary Weisman* filed briefs for petitioners in No. 89-1392.

Solicitor General Starr argued the cause and filed a brief for respondent in both cases. With him on the brief were *Assistant Attorney General Gerson, Deputy Solicitor General Roberts, Jeffrey P. Minear, Anthony J. Steinmeyer, Lowell V. Sturgill, Jr.,* and *Joel Mangel.*†

† Briefs of *amici curiae* urging reversal were filed for the Commonwealth of Massachusetts et al. by *David D. Cole, James M. Shannon,* Attorney General of Massachusetts, and *Ruth A. Bourquin,* Assistant Attorney General; for Anthony J. Celebrezze, Jr., Attorney General of Ohio, et al. by *Mr. Celebrezze, pro se, Suzanne E. Mohr* and *Jack W. Decker,* Assistant Attorneys General, and *Rita S. Eppler, Douglas B. Baily,* Attorney General of Alaska, *John K. Van de Kamp,* Attorney General of California, *Clarine Nardi Riddle,* Attorney General of Connecticut, *Charles M. Oberly III,* Attorney General of Delaware, *Herbert O. Reid, Sr.,* Corporation Counsel for the District of Columbia, *James E. Tierney,* Attorney General of Maine, *Hubert H. Humphrey III,* Attorney General of Minnesota, *Robert M. Spire,* Attorney General of Nebraska, *Robert J. Del Tufo,* Attorney General of New Jersey, *Dave Frohnmayer,* Attorney General of Oregon, *Jim Mattox,* Attorney General of Texas, *Jeffrey L. Amestoy,* Attorney General of Vermont, and *Mary Sue Terry,* Attorney General of Virginia; for the American College of Obstetricians and Gynecologists et al. by *Carter G. Phillips, Ann E. Allen, Kirk B. Johnson, Laurie R. Rockett, Joel I. Klein,* and *Jack R. Bierig;* for the American Library Association et al. by *Bruce J. Ennis, Jr.,* and *David W. Ogden;* for the American Public Health Association et al. by *Larry M. Lavinsky, Charles S. Sims, Michele M. Ovesey,* and *Nadine Taub;* for the Association of the Bar of the City of New York by *Conrad K. Harper, Janice Goodman,* and *Diane S. Wilner;* for the NAACP Legal Defense and Educational Fund, Inc., et al. by *Julius LeVonne Chambers* and *Charles Stephen Ralston;* for the National Association of Women Lawyers et al. by *James F. Fitzpatrick, L. Hope O'Keeffe,* and *Walter Dellinger;* for the Planner Parenthood Federation of America et al. by *Dara Klassel, Eve W. Paul,* and *Barbara E. Otten;* for Twenty-Two Biomedical Ethicists by *Michael E. Fine* and *Douglas W. Smith;* and for Representative Patricia Schroeder et al. by *David M. Becker.*

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Opinion

***177** Chief Justice REHNQUIST delivered the opinion of the Court.

These cases concern a facial challenge to Department of Health and Human Services (HHS) regulations which limit ***178** the ability of Title X fund recipients to engage in abortion-related activities. The United States Court of Appeals for the Second Circuit upheld the regulations, finding them to be a permissible construction of the statute as well as consistent with the First and Fifth Amendments to the Constitution. We granted certiorari to resolve a split among the Courts of Appeals. [1] We affirm.

1 Both the First Circuit and the Tenth Circuit have invalidated the regulations, primarily on constitutional grounds. See *Massachusetts v. Secretary of Health and Human Services,* 899 F.2d 53 (CA1 1990); *Planned Parenthood Federation of America v. Sullivan,* 913 F.2d 1492 (CA10 1990).

I

A

In 1970, Congress enacted Title X of the Public Health Service Act (Act), 84 Stat. 1506, as amended, 42 U.S.C. §§ 300 to 300a–6, which provides federal funding for family-planning services. The Act authorizes the Secretary to "make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services." § 300(a). Grants and contracts under Title X must "be made in accordance with such regulations as the Secretary may promulgate." § 300a–4(a). Section 1008 of the Act, however, provides that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." ****1765** 42 U.S.C. § 300a–6. That restriction was intended to ensure that Title X funds would "be used only to support preventive family ***179** planning services, population research, infertility services, and other related medical, informational, and educational activities." H.R.Conf.Rep. No. 91–1667, p. 8 (1970), U.S.Code Cong. & Admin.News 1970, pp. 5068, 5081–82.

In 1988, the Secretary promulgated new regulations designed to provide " 'clear and operational guidance' to grantees about how to preserve the distinction between Title X programs and abortion as a method of family planning." 53 Fed.Reg. 2923–2924 (1988). The regulations clarify, through the definition of the term "family planning," that Congress intended Title X funds "to be used only to support *preventive* family planning services." H.R.Conf.Rep. No. 91–1667, p. 8, U.S.Code Cong. & Admin.News 1970, p. 5081 (emphasis added). Accordingly, Title X services are limited to "preconceptional counseling, education, and general reproductive health care," and expressly exclude "pregnancy care (including obstetric or prenatal care)." 42 CFR § 59.2 (1989).[2] The regulations "focus the emphasis of the Title X program on its traditional mission: The provision of preventive family planning services specifically designed to enable individuals to determine the number and spacing of their children, while clarifying that pregnant women must be referred to appropriate prenatal care services." 53 Fed.Reg. 2925 (1988).

2 "Most clients of title X-sponsored clinics are not pregnant and generally receive only physical examinations, education on contraceptive methods, and services related to birth control." General Accounting Office Report, App. 95.

The regulations attach three principal conditions on the grant of federal funds for Title X projects. First, the regulations specify that a "Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning." 42 CFR § 59.8(a)(1) (1989). Because Title X is limited to preconceptional services, the program does not furnish services related to childbirth. Only in the context of a referral out of the Title X program is a pregnant woman given transitional information. § 59.8(a)(2). Title X ***180** projects must refer every pregnant client "for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child." *Ibid.* The list may not be used indirectly to encourage or promote abortion, "such as by weighing the list of referrals in favor of health care providers which perform abortions, by including on the list of referral providers health care providers whose principal business is the provision of abortions, by excluding available providers who do not provide abortions, or by 'steering' clients to providers who offer abortion as a method of family planning." § 59.8(a)(3). The Title X project is expressly prohibited from referring a pregnant woman to an abortion provider, even upon specific request. One permissible response to such an inquiry is that "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion." § 59.8(b)(5).

Second, the regulations broadly prohibit a Title X project from engaging in activities that "encourage, promote or advocate abortion as a method of family planning." § 59.10(a). Forbidden activities include lobbying for legislation that would increase the availability of abortion as a method of family planning, developing or disseminating materials advocating abortion as a method of family planning, providing speakers to promote abortion as a method of family planning, using legal action to make abortion available in any way as a method of family planning, and paying dues to any group that advocates abortion as a method of family planning as a substantial part of its activities. *Ibid.*

****1766** Third, the regulations require that Title X projects be organized so that they are "physically and financially separate" from prohibited abortion activities.

§ 59.9. To be deemed physically and financially separate, "a Title X project must have an objective integrity and independence from prohibited activities. Mere bookkeeping separation of Title X funds from other monies is not sufficient." *Ibid.* The regulations ***181** provide a list of nonexclusive factors for the Secretary to consider in conducting a case-by-case determination of objective integrity and independence, such as the existence of separate accounting records and separate personnel, and the degree of physical separation of the project from facilities for prohibited activities. *Ibid.*

B

Petitioners are Title X grantees and doctors who supervise Title X funds suing on behalf of themselves and their patients. Respondent is the Secretary of HHS. After the regulations had been promulgated, but before they had been applied, petitioners filed two separate actions, later consolidated, challenging the facial validity of the regulations and seeking declaratory and injunctive relief to prevent implementation of the regulations. Petitioners challenged the regulations on the grounds that they were not authorized by Title X and that they violate the First and Fifth Amendment rights of Title X clients and the First Amendment rights of Title X health providers. After initially granting petitioners a preliminary injunction, the District Court rejected petitioners' statutory and constitutional challenges to the regulations and granted summary judgment in favor of the Secretary. *New York v. Bowen,* 690 F.Supp. 1261 (SDNY 1988).

A panel of the Court of Appeals for the Second Circuit affirmed. 889 F.2d 401 (1989). Applying this Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842–843, 104 S.Ct. 2778, 2781–2782, 81 L.Ed.2d 694 (1984), the Court of Appeals determined that the regulations were a permissible construction of the statute that legitimately effectuated congressional intent. The court rejected as "highly strained," petitioners' contention that the plain language of § 1008 forbids Title X projects only from performing abortions. The court reasoned that "it would be wholly anomalous to read Section 1008 to mean that a program that merely counsels but does not perform abortions does not include abortion as a 'method of family planning.' " 889 F.2d, at 407. "[T]he natural ***182** construction of ... the term 'method of family planning' includes counseling concerning abortion." *Ibid.* The court found this construction consistent with the legislative history and observed that "[a]ppellants' contrary view of the legislative history is based entirely on highly generalized statements about the expansive scope of the family planning services" that "do not specifically mention counseling concerning abortion as an intended service of Title X projects" and that "surely cannot be read to trump a section of the statute that specifically excludes it." *Id.,* at 407–408.

Turning to petitioners' constitutional challenges to the regulations, the Court of Appeals rejected petitioners' Fifth Amendment challenge. It held that the regulations do not impermissibly burden a woman's right to an abortion because the "government may validly choose to favor childbirth over abortion and to implement that choice by funding medical services relating to childbirth but not those relating to abortion." *Id.,* at 410. Finding that the prohibition on the performance of abortions upheld by the Court in *Webster v. Reproductive Health Services,* 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989), was "substantially greater in impact than the regulations challenged in the instant matter," 889 F.2d, at 411, the court concluded that the regulations "create[d] no affirmative legal barriers to access to abortion." *Ibid.,* citing *Webster v. Reproductive Health Services.*

****1767** The court likewise found that the "Secretary's implementation of Congress's decision not to fund abortion counseling, referral or advocacy also does not, under applicable Supreme Court precedent, constitute a facial violation of the First Amendment rights of health care providers or of women." 889 F.2d, at 412. The court explained that under *Regan v. Taxation with Representation of Wash.,* 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983), the Government has no obligation to subsidize even the exercise of fundamental rights, including "speech rights." The court also held that the regulations do not violate the First Amendment by "condition[ing] receipt of a benefit on the ***183** relinquishment of constitutional rights" because Title X grantees and their employees "remain free to say whatever they wish about abortion outside the Title X project." 889 F.2d, at 412. Finally, the court rejected petitioners' contention that the regulations "facially discriminate on the basis of the viewpoint of the speech involved." *Id.,* at 414.

II

We begin by pointing out the posture of the cases before us. Petitioners are challenging the *facial* validity of the regulations. Thus, we are concerned only with the question whether, on their face, the regulations are both authorized by the Act and can be construed in such a manner that they can be applied to a set of individuals without infringing upon constitutionally protected rights. Petitioners face a heavy burden in seeking to have the regulations invalidated as facially unconstitutional. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid." *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987).

We turn first to petitioners' contention that the regulations exceed the Secretary's authority under Title X and are arbitrary and capricious. We begin with an examination of the regulations concerning abortion counseling, referral, and advocacy, which every Court of Appeals has found to be authorized by the statute, and then turn to the "program integrity requirement," with respect to which the courts below have adopted conflicting positions. We then address petitioner's claim that the regulations must be struck down because they raise a substantial constitutional question.

***184** A

[1] We need not dwell on the plain language of the statute because we agree with every court to have addressed the issue that the language is ambiguous. The language of § 1008—that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning"—does not speak directly to the issues of counseling, referral, advocacy, or program integrity. If a statute is "silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron,* 467 U.S., at 842–843, 104 S.Ct., at 2782.

The Secretary's construction of Title X may not be disturbed as an abuse of discretion if it reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent. *Ibid.,* In determining whether a construction is permissible, "[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted ... or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.,* at 843, n. 11, 104 S.Ct., at 2782, n. 11. Rather, substantial deference is accorded to the interpretation of the authorizing statute by the agency authorized with administering it. *Id.,* at 844, 104 S.Ct., at 2782.

****1768** **[2]** The broad language of Title X plainly allows the Secretary's construction of the statute. By its own terms, § 1008 prohibits the use of Title X funds "in programs where abortion is a method of family planning." Title X does not define the term "method of family planning," nor does it enumerate what types of medical and counseling services are entitled to Title X funding. Based on the broad directives provided by Congress in Title X in general and § 1008 in particular, we are unable to say that the Secretary's construction of the prohibition in § 1008 to require a ban on counseling, referral, and advocacy within the Title X project is impermissible.

***185** The District Courts and Courts of Appeals that have examined the legislative history have all found, at least with regard to the Act's counseling, referral, and advocacy provisions, that the legislative history is ambiguous with respect to Congress' intent in enacting Title X and the prohibition of § 1008. *Massachusetts v. Secretary of Health and Human Services,* 899 F.2d 53, 62 (CA1 1990) ("Congress has not addressed specifically the question of the scope of the abortion prohibition. The language of the statute and the legislative history can support either of the litigants' positions"); *Planned Parenthood Federation of America v. Sullivan,* 913 F.2d 1492, 1497 (CA10 1990) ("[T]he contemporaneous legislative history does not address whether clinics receiving Title X funds can engage in nondirective counseling including the abortion option and referrals"); 889 F.2d, at 407 (case below) ("Nothing in the legislative history of Title X detracts" from the Secretary's construction of § 1008). We join these courts in holding that the legislative history is ambiguous and

fails to shed light on relevant congressional intent. At no time did Congress directly address the issues of abortion counseling, referral, or advocacy. The parties' attempts to characterize highly generalized, conflicting statements in the legislative history into accurate revelations of congressional intent are unavailing. [3]

3 For instance, the Secretary relies on the following passage of the House Report as evidence that the regulations are consistent with legislative intent:

> "It is, and has been, the intent of both Houses that the funds authorized under this legislation be used only to support preventive family planning services, population research, infertility services, and other related medical, informational, and educational activities. The conferees have adopted the language contained in section 1008, which prohibits the use of such funds for abortion, in order to make this intent clear." H.R.Conf.Rep. No. 91–1667, p. 8 (1970), U.S.Code Cong. & Admin.News 1970, pp. 5081–82. Petitioners, however, point to language in the statement of purpose in the House Report preceding the passage of Title X stressing the importance of supplying both family planning information and a full range of family planning information and of developing a comprehensive and coordinated program. Petitioners also rely on the Senate Report, which states:
>
> "The committee does not view family planning as merely a euphemism for birth control. It is properly a part of comprehensive health care and should consist of much more than the dispensation of contraceptive devices.... [A] successful family planning program must contain ... [m]edical services, including consultation examination, prescription, and continuing supervision, supplies, instruction, and referral to other medical services as needed." S.Rep. No. 91–1004, p. 10 (1970).
>
> These directly conflicting statements of legislative intent demonstrate amply the inadequacies of the "traditional tools of statutory construction," *INS v. Cardoza–Fonseca,* 480 U.S. 421, 446–447, 107 S.Ct. 1207, 1221, 94 L.Ed.2d 434 (1987), in resolving the issue before us.

***186** When we find, as we do here, that the legislative history is ambiguous and unenlightening on the matters with respect to which the regulations deal, we customarily defer to the expertise of the agency. Petitioners argue, however, that the regulations are entitled to little or no deference because they "reverse a longstanding agency policy that permitted nondirective counseling and referral for abortion," Brief for Petitioners in No. 89–1392, p. 20, and thus represent a sharp break from the Secretary's prior construction of the statute. Petitioners argue that the agency's prior consistent interpretation of § 1008 to permit nondirective counseling and to encourage coordination with local ****1769** and state family planning services is entitled to substantial weight.

[3] This Court has rejected the argument that an agency's interpretation "is not entitled to deference because it represents a sharp break with prior interpretations" of the statute in question. *Chevron,* 467 U.S., at 862, 104 S.Ct., at 2791. In *Chevron,* we held that a revised interpretation deserves deference because "[a]n initial agency interpretation is not instantly carved in stone" and "the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." *Id.,* at 863–864, 104 S.Ct., at 2792. An agency is not required to " 'establish rules of conduct to last forever,' " *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State* ***187** *Farm Mut. Automobile Ins. Co.,* 463 U.S. 29, 42, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983), quoting *American Trucking Assns., Inc. v. Atchison, T. & S.F.R. Co.,* 387 U.S. 397, 416, 87 S.Ct. 1608, 1618, 18 L.Ed.2d 847 (1967); *NLRB v. Curtin Matheson Scientific, Inc.,* 494 U.S. 775, 110 S.Ct. 1542, 108 L.Ed.2d 801 (1990), but rather "must be given ample latitude to 'adapt [its] rules and policies to the demands of changing circumstances.' " *Motor Vehicle Mfrs., supra,* 463 U.S., at 42, 103 S.Ct., at 2866, quoting *Permian Basin Area Rate Cases,* 390 U.S. 747, 784, 88 S.Ct. 1344, 1369, 20 L.Ed.2d 312 (1968).

[4] We find that the Secretary amply justified his change of interpretation with a "reasoned analysis." *Motor Vehicle Mfrs., supra,* 463 U.S., at 42, 103 S.Ct., at 2866. The Secretary explained that the regulations are a result of his determination, in the wake of the critical reports of the General Accounting Office (GAO) and the Office of the Inspector General (OIG), that prior policy failed to implement properly the statute and that it was necessary to provide " 'clear and operational guidance' to grantees about how to preserve the distinction between Title X programs and abortion as a method of family planning." 53 Fed.Reg. 2923–2924 (1988). He also determined that the new regulations are more in keeping with the original intent of the statute, are justified by client experience under the prior policy, and are supported by a shift in attitude against the "elimination of unborn children

by abortion." We believe that these justifications are sufficient to support the Secretary's revised approach. Having concluded that the plain language and legislative history are ambiguous as to Congress' intent in enacting Title X, we must defer to the Secretary's permissible construction of the statute.

B

[5] We turn next to the "program integrity" requirements embodied at § 59.9 of the regulations, mandating separate facilities, personnel, and records. These requirements are not inconsistent with the plain language of Title X. Petitioners contend, however, that they are based on an impermissible construction of the statute because they frustrate the clearly ***188** expressed intent of Congress that Title X programs be an integral part of a broader, comprehensive, health-care system. They argue that this integration is impermissibly burdened because the efficient use of non-Title X funds by Title X grantees will be adversely affected by the regulations.

The Secretary defends the separation requirements of § 59.9 on the grounds that they are necessary to assure that Title X grantees apply federal funds only to federally authorized purposes and that grantees avoid creating the appearance that the Government is supporting abortion-related activities. The program integrity regulations were promulgated in direct response to the observations in the GAO and OIG reports that "[b]ecause the distinction between the recipients' title X and other activities may not be easily recognized, the public can get the impression that Federal funds are being improperly used for abortion activities." App. 85. The Secretary concluded:

> ****1770** "[M]eeting the requirement of section 1008 mandates that Title X programs be organized so that they are physically and financially separate from other activities which are prohibited from inclusion in a Title X program. Having a program that is separate from such activities is a necessary predicate to any determination that abortion is not being included as a method of family planning in the Title X program." 53 Fed.Reg. 2940 (1988).

The Secretary further argues that the separation requirements do not represent a deviation from past policy because the agency has consistently taken the position that § 1008 requires some degree of physical and financial separation between Title X projects and abortion-related activities.

We agree that the program integrity requirements are based on a permissible construction of the statute and are not inconsistent with congressional intent. As noted, the legislative history is clear about very little, and program integrity is no exception. The statements relied upon by petitioners ***189** to infer such an intent are highly generalized and do not directly address the scope of § 1008.

For example, the cornerstone of the conclusion that in Title X Congress intended a comprehensive, integrated system of family planning services is the statement in the statute requiring state health authorities applying for Title X funds to submit "a State plan for a coordinated and comprehensive program of family planning services." § 1002. This statement is, on its face, ambiguous as to Congress' intent in enacting Title X and the prohibition of § 1008. Placed in context, the statement merely requires that a state health authority submit a plan for a "coordinated and comprehensive program of family planning services" in order to be eligible for Title X funds. By its own terms, the language evinces Congress' intent to place a duty on state entities seeking federal funds; it does not speak either to an overall view of family planning services or to the Secretary's responsibility for implementing the statute. Likewise, the statement in the original House Report on Title X that the Act was "not intended to interfere with or limit programs conducted in accordance with State or local laws" and supported through non-Title X funds is equally unclear. H.R.Conf.Rep. No. 91–1667, pp. 8–9 (1970), U.S.Code Cong. & Admin.News 1970, p. 5082. This language directly follows the statement that it is the "intent of both Houses that the funds authorized under this legislation be used only to support preventive family planning services.... The conferees have adopted the language contained in section 1008, which prohibits the use of such funds for abortion, in order to make this intent clear." *Id.,* at 8, U.S.Code Cong. & Admin.News 1970, pp. 5081–82. When placed in context and read in light of the express prohibition of § 1008, the statements fall short of evidencing a congressional intent that would render the Secretary's interpretation of the statute impermissible.

While petitioners' interpretation of the legislative history may be a permissible one, it is by no means the only one, and it is certainly not the one found by the Secretary. It is

well ***190** established that legislative history which does not demonstrate a clear and certain congressional intent cannot form the basis for enjoining regulations. See *Motor Vehicle Mfrs.,* 463 U.S., at 42, 103 S.Ct., at 2866. The Secretary based the need for the separation requirements "squarely on the congressional intent that abortion not be a part of a Title X funded program." 52 Fed.Reg. 33212 (1987). Indeed, if one thing is clear from the legislative history, it is that Congress intended that Title X funds be kept separate and distinct from abortion-related activities. It is undisputed that Title X was intended to provide primarily prepregnancy preventive services. Certainly the Secretary's interpretation of the statute that separate facilities are necessary, especially in light of the express prohibition of § 1008, cannot be judged unreasonable. Accordingly, we defer to the Secretary's reasoned determination that the program integrity requirements ****1771** are necessary to implement the prohibition.

Petitioners also contend that the regulations must be invalidated because they raise serious questions of constitutional law. They rely on *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council,* 485 U.S. 568, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988), and *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979), which hold that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." *Id.,* at 500, 99 S.Ct., at 1318. Under this canon of statutory construction, " '[t]he elementary rule is that every reasonable construction must be resorted to, in order to *save* a *statute* from unconstitutionality.' " *DeBartolo Corp., supra,* 485 U.S., at 575, 108 S.Ct., at 1397 (emphasis added), quoting *Hooper v. California,* 155 U.S. 648, 657, 15 S.Ct. 207, 211, 39 L.Ed. 297 (1895).

The principle enunciated in *Hooper v. California, supra,* and subsequent cases, is a categorical one: "as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act." *Blodgett v. Holden,* 275 U.S. 142, 148, 48 S.Ct. 105, 107, 72 L.Ed. 206 (1927) (opinion of Holmes, J.). This principle ***191** is based at least in part on the fact that a decision to declare an Act of Congress unconstitutional "is the gravest and most delicate duty that this Court is called on to perform." *Ibid.* Following *Hooper, supra,* cases such as *United States ex rel. Attorney General v. Delaware & Hudson Co.,* 213 U.S. 366, 408, 29 S.Ct. 527, 535, 53 L.Ed. 836 (1909), and *United States v. Jin Fuey Moy,* 241 U.S. 394, 401, 36 S.Ct. 658, 659, 60 L.Ed. 1061 (1916), developed the corollary doctrine that "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." This canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations. *FTC v. American Tobacco Co.,* 264 U.S. 298, 305–307, 44 S.Ct. 336, 337, 68 L.Ed. 696 (1924). It is qualified by the proposition that "avoidance of a difficulty will not be pressed to the point of disingenuous evasion." *George Moore Ice Cream Co. v. Rose,* 289 U.S. 373, 379, 53 S.Ct. 620, 622, 77 L.Ed. 1265 (1933).

Here Congress forbade the use of appropriated funds in programs where abortion is a method of family planning. It authorized the Secretary to promulgate regulations implementing this provision. The extensive litigation regarding governmental restrictions on abortion since our decision in *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), suggests that it was likely that any set of regulations promulgated by the Secretary—other than the ones in force prior to 1988 and found by him to be relatively toothless and ineffectual—would be challenged on constitutional grounds. While we do not think that the constitutional arguments made by petitioners in these cases are without some force, in Part III, *infra*, we hold that they do not carry the day. Applying the canon of construction under discussion as best we can, we hold that the regulations promulgated by the Secretary do not raise the sort of "grave and doubtful constitutional questions," *Delaware & Hudson Co., supra,* 213 U.S., at 408, 29 S.Ct., at 536, that would lead us to assume Congress did not intend to authorize their issuance. Therefore, we need not invalidate the regulations in order to save the statute from unconstitutionality.

***192** III

[6] Petitioners contend that the regulations violate the First Amendment by impermissibly discriminating based on viewpoint because they prohibit "all discussion about abortion as a lawful option—including counseling, referral, and the provision of neutral and accurate information about ending a pregnancy—while compelling the clinic or ****1772** counselor to provide information that promotes continuing a pregnancy to term." Brief for Petitioners in No. 89–1391, p. 11. They assert that the

regulations violate the "free speech rights of private health care organizations that receive Title X funds, of their staff, and of their patients" by impermissibly imposing "viewpoint-discriminatory conditions on government subsidies" and thus "penaliz [e] speech funded with non-Title X monies." *Id.,* at 13, 14, 24. Because "Title X continues to fund speech ancillary to pregnancy testing in a manner that is not evenhanded with respect to views and information about abortion, it invidiously discriminates on the basis of viewpoint." *Id.,* at 18. Relying on *Regan v. Taxation with Representation of Wash.,* 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983), and *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 234, 107 S.Ct. 1722, 1730, 95 L.Ed.2d 209 (1987), petitioners also assert that while the Government may place certain conditions on the receipt of federal subsidies, it may not "discriminate invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas.' " *Regan, supra,* 461 U.S., at 548, 103 S.Ct., at 2002 (quoting *Cammarano v. United States,* 358 U.S. 498, 513, 79 S.Ct. 524, 533, 3 L.Ed.2d 462 (1959)).

There is no question but that the statutory prohibition contained in § 1008 is constitutional. In *Maher v. Roe,* 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977), we upheld a state welfare regulation under which Medicaid recipients received payments for services related to childbirth, but not for nontherapeutic abortions. The Court rejected the claim that this unequal subsidization worked a violation of the Constitution. We held that the government may "make a value judgment favoring childbirth over abortion, and ... implement that judgment by the allocation ***193** of public funds." *Id.,* 432 U.S., at 474, 97 S.Ct., at 2382. Here the Government is exercising the authority it possesses under *Maher* and *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980), to subsidize family planning services which will lead to conception and childbirth, and declining to "promote or encourage abortion." The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other. "[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Regan, supra,* 461 U.S., at 549, 103 S.Ct., at 2003. See also *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976); *Cammarano v. United States, supra.* "A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *McRae, supra,* 448 U.S., at 317, n. 19, 100 S.Ct., at 2688, n. 19. "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Maher, supra,* 432 U.S., at 475, 97 S.Ct., at 2383.

The challenged regulations implement the statutory prohibition by prohibiting counseling, referral, and the provision of information regarding abortion as a method of family planning. They are designed to ensure that the limits of the federal program are observed. The Title X program is designed not for prenatal care, but to encourage family planning. A doctor who wished to offer prenatal care to a project patient who became pregnant could properly be prohibited from doing so because such service is outside the scope of the federally funded program. The regulations prohibiting abortion counseling and referral are of the same ilk; "no funds appropriated for the project may be used in programs where abortion is a method of family planning," and a doctor employed by the project may be prohibited in ***194** the course of his project duties from counseling abortion or referring for abortion. This is not a case of the Government "suppressing a dangerous idea," but of a prohibition on a project grantee ****1773** or its employees from engaging in activities outside of the project's scope.

To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect. When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, 22 U.S.C. § 4411(b), it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism. Petitioners' assertions ultimately boil down to the position that if the government chooses to subsidize one protected right, it must subsidize analogous counterpart rights. But the Court has soundly rejected that proposition. *Regan v. Taxation with Representation of Wash., supra; Maher v.*

Roe, supra; Harris v. McRae, supra. Within far broader limits than petitioners are willing to concede, when the Government appropriates public funds to establish a program it is entitled to define the limits of that program.

We believe that petitioners' reliance upon our decision in *Arkansas Writers' Project, supra,* is misplaced. That case involved a state sales tax which discriminated between magazines on the basis of their content. Relying on this fact, and on the fact that the tax "targets a small group within the press," contrary to our decision in *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue,* 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983), the Court held the tax invalid. But we have here not the case of a general law singling out a disfavored group on the basis of speech content, but a case of the Government refusing ***195** to fund activities, including speech, which are specifically excluded from the scope of the project funded.

[7] Petitioners rely heavily on their claim that the regulations would not, in the circumstance of a medical emergency, permit a Title X project to refer a woman whose pregnancy places her life in imminent peril to a provider of abortions or abortion-related services. These cases, of course, involve only a facial challenge to the regulations, and we do not have before us any application by the Secretary to a specific fact situation. On their face, we do not read the regulations to bar abortion referral or counseling in such circumstances. Abortion counseling as a "method of family planning" is prohibited, and it does not seem that a medically necessitated abortion in such circumstances would be the equivalent of its use as a "method of family planning." Neither § 1008 nor the specific restrictions of the regulations would apply. Moreover, the regulations themselves contemplate that a Title X project would be permitted to engage in otherwise-prohibited abortion-related, activity in such circumstances. Section 59.8(a)(2) provides a specific exemption for emergency care and requires Title X recipients "to refer the client immediately to an appropriate provider of emergency medical services." 42 CFR § 59.8(a)(2) (1989). Section 59.5(b)(1) also requires Title X projects to provide "necessary referral to other medical facilities when medically indicated." [4]

4 We also find that, on their face, the regulations are narrowly tailored to fit Congress' intent in Title X that federal funds not be used to "promote or advocate" abortion as a "method of family planning." The regulations are designed to ensure compliance with the prohibition of § 1008 that none of the funds appropriated under Title X be used in a program where abortion is a method of family planning. We have recognized that Congress' power to allocate funds for public purposes includes an ancillary power to ensure that those funds are properly applied to the prescribed use. See *South Dakota v. Dole,* 483 U.S. 203, 207–209, 107 S.Ct. 2793, 2796–2797, 97 L.Ed.2d 171 (1987) (upholding against Tenth Amendment challenge requirement that States raise drinking age as condition to receipt of federal highway funds); *Buckley v. Valeo,* 424 U.S. 1, 99, 96 S.Ct. 612, 673, 46 L.Ed.2d 659 (1976).

[8] ***196** Petitioners also contend that the restrictions on the subsidization of abortion- ****1774** related speech contained in the regulations are impermissible because they condition the receipt of a benefit, in these cases Title X funding, on the relinquishment of a constitutional right, the right to engage in abortion advocacy and counseling. Relying on *Perry v. Sindermann,* 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972), and *FCC v. League of Women Voters of Cal.,* 468 U.S. 364, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984), petitioners argue that "even though the government may deny [a] ... benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry, supra,* 408 U.S., at 597, 92 S.Ct., at 2697.

Petitioners' reliance on these cases is unavailing, however, because here the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized. The Secretary's regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities. Title X expressly distinguishes between a Title X *grantee* and a Title X *project.* The grantee, which normally is a health-care organization, may receive funds from a variety of sources for a variety of purposes. Brief for Petitioners in No. 89–1391, pp. 3, n. 5, 13. The grantee receives Title X funds, however, for the specific and limited purpose of establishing and operating a Title X project. 42 U.S.C. § 300(a). The regulations govern the scope of the Title X *project's* activities, and leave the grantee unfettered in its other activities. The Title X *grantee* can continue to perform

abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds. 42 CFR § 59.9 (1989).

***197** In contrast, our "unconstitutional conditions" cases involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program. In *FCC v. League of Women Voters of Cal.,* we invalidated a federal law providing that noncommercial television and radio stations that receive federal grants may not "engage in editorializing." Under that law, a recipient of federal funds was "barred absolutely from all editorializing" because it "is not able to segregate its activities according to the source of its funding" and thus "has no way of limiting the use of its federal funds to all noneditorializing activities." The effect of the law was that "a noncommercial educational station that receives only 1% of its overall income from [federal] grants is barred absolutely from all editorializing" and "barred from using even wholly private funds to finance its editorial activity." 468 U.S., at 400, 104 S.Ct., at 3128. We expressly recognized, however, that were Congress to permit the recipient stations to "establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism would plainly be valid." *Ibid.* Such a scheme would permit the station "to make known its views on matters of public importance through its nonfederally funded, editorializing affiliate without losing federal grants for its noneditorializing broadcast activities." *Ibid.*

Similarly, in *Regan* we held that Congress could, in the exercise of its spending power, reasonably refuse to subsidize the lobbying activities of tax-exempt charitable organizations by prohibiting such organizations from using tax-deductible contributions to support their lobbying efforts. In so holding, we explained that such organizations remained free "to receive deductible contributions to ****1775** support ... nonlobbying activit[ies]." 461 U.S., at 545, 103 S.Ct., at 2001. Thus, a charitable organization could create, under ***198** § 501(c)(3) of the Internal Revenue Code of 1954, 26 U.S.C. § 501(c)(3), an affiliate to conduct its nonlobbying activities using tax-deductible contributions, and at the same time establish, under § 501(c)(4), a separate affiliate to pursue its lobbying efforts without such contributions. 461 U.S., at 544, 103 S.Ct., at 2000. Given that alternative, the Court concluded that "Congress has not infringed any First Amendment rights or regulated any First Amendment activity[; it] has simply chosen not to pay for [appellee's] lobbying." *Id.,* at 546, 103 S.Ct., at 2001. We also noted that appellee "would, of course, have to ensure that the § 501(c)(3) organization did not subsidize the § 501(c)(4) organization; otherwise, public funds might be spent on an activity Congress chose not to subsidize." *Id.,* at 544, 103 S.Ct., at 2000. The condition that federal funds will be used only to further the purposes of a grant does not violate constitutional rights. "Congress could, for example, grant funds to an organization dedicated to combating teenage drug abuse, but condition the grant by providing that none of the money received from Congress should be used to lobby state legislatures." See *id.,* at 548, 103 S.Ct., at 2002.

By requiring that the Title X grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has, consistent with our teachings in *League of Women Voters* and *Regan,* not denied it the right to engage in abortion-related activities. Congress has merely refused to fund such activities out of the public fisc, and the Secretary has simply required a certain degree of separation from the Title X project in order to ensure the integrity of the federally funded program.

The same principles apply to petitioners' claim that the regulations abridge the free speech rights of the grantee's staff. Individuals who are voluntarily employed for a Title X project must perform their duties in accordance with the regulation's restrictions on abortion counseling and referral. The employees remain free, however, to pursue abortion-related activities when they are not acting under the auspices of the Title X project. The regulations, which govern solely ***199** the scope of the Title X project's activities, do not in any way restrict the activities of those persons acting as private individuals. The employees' freedom of expression is limited during the time that they actually work for the project; but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority. [5]

5 Petitioners also contend that the regulations violate the First Amendment by penalizing speech funded

with non-Title X moneys. They argue that since Title X requires that grant recipients contribute to the financing of Title X projects through the use of matching funds and grant-related income, the regulation's restrictions on abortion counseling and advocacy penalize privately funded speech.

We find this argument flawed for several reasons. First, Title X subsidies are just that, subsidies. The recipient is in no way compelled to operate a Title X project; to avoid the force of the regulations, it can simply decline the subsidy. See *Grove City College v. Bell,* 465 U.S. 555, 575, 104 S.Ct. 1211, 1222, 79 L.Ed.2d 516 (1984) (petitioner's First Amendment rights not violated because it "may terminate its participation in the [federal] program and thus avoid the requirements of [the federal program]"). By accepting Title X funds, a recipient voluntarily consents to any restrictions placed on any matching funds or grant-related income. Potential grant recipients can choose between accepting Title X funds—subject to the Government's conditions that they provide matching funds and forgo abortion counseling and referral in the Title X project—or declining the subsidy and financing their own unsubsidized program. We have never held that the Government violates the First Amendment simply by offering that choice. Second, the Secretary's regulations apply only to Title X programs. A recipient is therefore able to "limi[t] the use of its federal funds to [Title X] activities." *FCC v. League of Women Voters of Cal.,* 468 U.S. 364, 400, 104 S.Ct. 3106, 3128, 82 L.Ed.2d 278 (1984). It is in no way "barred from using even wholly private funds to finance" its pro-abortion activities outside the Title X program. *Ibid.* The regulations are limited to Title X funds; the recipient remains free to use private, non-Title X funds to finance abortion-related activities.

****1776** This is not to suggest that funding by the Government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify Government control over the content of expression. For example, this Court has recognized ***200** that the existence of a Government "subsidy," in the form of Government-owned property, does not justify the restriction of speech in areas that have "been traditionally open to the public for expressive activity," *United States v. Kokinda,* 497 U.S. 720, 726, 110 S.Ct. 3115, 3119, 111 L.Ed.2d 571 (1990); *Hague v. CIO,* 307 U.S. 496, 515, 59 S.Ct. 954, 963, 83 L.Ed. 1423 (1939) (opinion of Roberts, J.), or have been "expressly dedicated to speech activity." *Kokinda, supra,* at 726, 110 S.Ct., at 3119; *Perry Ed. Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 45, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983). Similarly, we have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment, *Keyishian v. Board of Regents, State Univ. of N.Y.,* 385 U.S. 589, 603, 605–606, 87 S.Ct. 675, 683, 684–685, 17 L.Ed.2d 629 (1967). It could be argued by analogy that traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government. We need not resolve that question here, however, because the Title X program regulations do not significantly impinge upon the doctor-patient relationship. Nothing in them requires a doctor to represent as his own any opinion that he does not in fact hold. Nor is the doctor-patient relationship established by the Title X program sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice. The program does not provide post conception medical care, and therefore a doctor's silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her. The doctor is always free to make clear that advice regarding abortion is simply beyond the scope of the program. In these circumstances, the general rule that the Government may choose not to subsidize speech applies with full force.

***201** IV

[9] We turn now to petitioners' argument that the regulations violate a woman's Fifth Amendment right to choose whether to terminate her pregnancy. We recently reaffirmed the long-recognized principle that " 'the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.' " *Webster,* 492 U.S., at 507, 109 S.Ct., at 3051, quoting *DeShaney v. Winnebago County Dept. of Social Services,* 489 U.S. 189, 196, 109 S.Ct. 998, 1003, 103 L.Ed.2d 249 (1989). The Government has no constitutional duty

to subsidize an activity merely because the activity is constitutionally protected and may validly choose to fund childbirth over abortion and " 'implement that judgment by the allocation of public funds' " for medical services relating to childbirth but not to those relating to abortion. *Webster, supra,* 492 U.S., at 510, 109 S.Ct., at 3052, (citation omitted). The Government has no affirmative duty to "commit any resources to facilitating abortions," *Webster,* 492 U.S., at 511, 109 S.Ct., at 3052, and its decision to fund childbirth but not abortion "places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity ****1777** deemed in the public interest." *McRae,* 448 U.S., at 315, 100 S.Ct., at 2687.

That the regulations do not impermissibly burden a woman's Fifth Amendment rights is evident from the line of cases beginning with *Maher* and *McRae* and culminating in our most recent decision in *Webster.* Just as Congress' refusal to fund abortions in *McRae* left "an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all," 448 U.S., at 317, 100 S.Ct., at 2688, and "Missouri's refusal to allow public employees to perform abortions in public hospitals leaves a pregnant woman with the same choices as if the State had chosen not ***202** to operate any public hospitals," *Webster, supra,* 492 U.S., at 509, 109 S.Ct., at 3052, Congress' refusal to fund abortion counseling and advocacy leaves a pregnant woman with the same choices as if the Government had chosen not to fund family-planning services at all. The difficulty that a woman encounters when a Title X project does not provide abortion counseling or referral leaves her in no different position than she would have been if the Government had not enacted Title X.

In *Webster,* we stated that "[h]aving held that the State's refusal [in *Maher*] to fund abortions does not violate *Roe v. Wade,* it strains logic to reach a contrary result for the use of public facilities and employees." 492 U.S., at 509–510, 109 S.Ct., at 3052. It similarly would strain logic, in light of the more extreme restrictions in those cases, to find that the mere decision to exclude abortion-related services from a federally funded *preconceptional* family planning program is unconstitutional.

[10] Petitioners also argue that by impermissibly infringing on the doctor-patient relationship and depriving a Title X client of information concerning abortion as a method of family planning, the regulations violate a woman's Fifth Amendment right to medical self-determination and to make informed medical decisions free of government-imposed harm. They argue that under our decisions in *Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983), and *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986), the Government cannot interfere with a woman's right to make an informed and voluntary choice by placing restrictions on the patient-doctor dialogue.

In *Akron,* we invalidated a city ordinance requiring *all* physicians to make specified statements to the patient prior to performing an abortion in order to ensure that the woman's consent was "truly informed." 462 U.S., at 423, 103 S.Ct., at 2488. Similarly, in *Thornburgh,* we struck down a state statute mandating that a list of agencies offering alternatives to abortion and a description of fetal development be provided to *every* woman considering terminating her pregnancy through an ***203** abortion. Critical to our decisions in *Akron* and *Thornburgh* to invalidate a governmental intrusion into the patient-doctor dialogue was the fact that the laws in both cases required *all* doctors within their respective jurisdictions to provide *all* pregnant patients contemplating an abortion a litany of information, regardless of whether the patient sought the information or whether the doctor thought the information necessary to the patient's decision. Under the Secretary's regulations, however, a doctor's ability to provide, and a woman's right to receive, information concerning abortion and abortion-related services outside the context of the Title X project remains unfettered. It would undoubtedly be easier for a woman seeking an abortion if she could receive information about abortion from a Title X project, but the Constitution does not require that the Government distort the scope of its mandated program in order to provide that information.

****1778** Petitioners contend, however, that most Title X clients are effectively precluded by indigency and poverty from seeing a health-care provider who will provide abortion-related services. But once again, even these Title X clients are in no worse position than if Congress had

never enacted Title X. "The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortion, but rather of her indigency." *McRae, supra,* 448 U.S., at 316, 100 S.Ct., at 2688.

The Secretary's regulations are a permissible construction of Title X and do not violate either the First or Fifth Amendments to the Constitution. Accordingly, the judgment of the Court of Appeals is

Affirmed.

Justice BLACKMUN, with whom Justice MARSHALL joins, with whom Justice STEVENS joins as to Parts II and ***204** III, and with whom Justice O'CONNOR joins as to Part I, dissenting.
Casting aside established principles of statutory construction and administrative jurisprudence, the majority in these cases today unnecessarily passes upon important questions of constitutional law. In so doing, the Court, for the first time, upholds viewpoint-based suppression of speech solely because it is imposed on those dependent upon the Government for economic support. Under essentially the same rationale, the majority upholds direct regulation of dialogue between a pregnant woman and her physician when that regulation has both the purpose and the effect of manipulating her decision as to the continuance of her pregnancy. I conclude that the Secretary's regulation of referral, advocacy, and counseling activities exceeds his statutory authority, and, also, that the regulations violate the First and Fifth Amendments of our Constitution. Accordingly, I dissent and would reverse the divided-vote judgment of the Court of Appeals.

I

The majority does not dispute that "[f]ederal statutes are to be so construed as to avoid serious doubt of their constitutionality." *Machinists v. Street,* 367 U.S. 740, 749, 81 S.Ct. 1784, 1790, 6 L.Ed.2d 1141 (1961). See also *Hooper v. California,* 155 U.S. 648, 657, 15 S.Ct. 207, 211, 39 L.Ed. 297 (1895); *Crowell v. Benson,* 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598 (1932); *United States v. Security Industrial Bank,* 459 U.S. 70, 78, 103 S.Ct. 407, 412, 74 L.Ed.2d 235 (1982). Nor does the majority deny that this principle is fully applicable to cases such as the instant ones, in which a plausible but constitutionally suspect statutory interpretation is embodied in an administrative regulation. See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council,* 485 U.S. 568, 575, 108 S.Ct. 1392, 1397, 99 L.Ed.2d 645 (1988); *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979); *Kent v. Dulles,* 357 U.S. 116, 129–130, 78 S.Ct. 1113, 1119, 2 L.Ed.2d 1204 (1958). Rather, in its zeal to address the constitutional issues, the majority sidesteps this established canon of construction with the feeble excuse that the challenged ***205** regulations "do not raise the sort of 'grave and doubtful constitutional questions,' ... that would lead us to assume Congress did not intend to authorize their issuance." *Ante,* at 1771, quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.,* 213 U.S. 366, 408, 29 S.Ct. 527, 536, 53 L.Ed. 836 (1909).

This facile response to the intractable problem the Court addresses today is disingenuous at best. Whether or not one believes that these regulations are valid, it avoids reality to contend that they do not give rise to serious constitutional questions. The canon is applicable to these cases not because "it was likely that [the regulations] ... would be challenged on constitutional grounds," *ante,* at 1771, but because the question squarely presented by the regulations—the extent to which the Government ****1779** may attach an otherwise unconstitutional condition to the receipt of a public benefit—implicates a troubled area of our jurisprudence in which a court ought not entangle itself unnecessarily. See, *e.g.,* Epstein, Unconstitutional Conditions, State Power, and the Limits of Consent, 102 Harv.L.Rev. 4, 6 (1988) (describing this problem as "the basic structural issue that for over a hundred years has bedeviled courts and commentators alike..."); Sullivan, Unconstitutional Conditions, 102 Harv.L.Rev. 1413, 1415–1416 (1989) (observing that this Court's unconstitutional conditions cases "seem a minefield to be traversed gingerly").

As is discussed in Parts II and III, *infra,* the regulations impose viewpoint-based restrictions upon protected speech and are aimed at a woman's decision whether to continue or terminate her pregnancy. In both respects, they implicate core constitutional values. This verity is evidenced by the fact that two of the three Courts

of Appeals that have entertained challenges to the regulations have invalidated them on constitutional grounds. See *Massachusetts v. Secretary of Health and Human Services,* 899 F.2d 53 (CA1 1990); *Planned Parenthood Federation of America v. Sullivan,* 913 F.2d 1492 (CA10 1990).

***206** A divided panel of the Tenth Circuit found the regulations to "fal[l] squarely within the prohibition in *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747 [106 S.Ct. 2169, 90 L.Ed.2d 779 (1986)], and *City of Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416 [103 S.Ct. 2481, 76 L.Ed.2d 687 (1983)], against state intrusion into the advice a woman requests from or is given by her doctor." *Id.,* at 1501. The First Circuit, en banc with one judge dissenting, found the regulations to violate both the privacy rights of Title X patients and the First Amendment rights of Title X grantees. See also 889 F.2d 401, 415 (CA2 1989) (Kearse, J., dissenting in part). That a bare majority of this Court today reaches a different result does not change the fact that the constitutional questions raised by the regulations are both grave and doubtful.

Nor is this a situation in which the statutory language itself requires us to address a constitutional question. Section 1008 of the Public Health Service Act, 84 Stat. 1508, 42 U.S.C. § 300a–6, provides simply: "None of the funds appropriated under this title shall be used in programs where abortion is a method of family planning." The majority concedes that this language "does not speak directly to the issues of counseling, referral, advocacy, or program integrity," *ante,* at 1767, and that "the legislative history is ambiguous" in this respect. *Ante,* at 1768. Consequently, the language of § 1008 easily sustains a constitutionally trouble-free interpretation. [1]

1 The majority states: "There is no question but that the statutory prohibition contained in § 1008 is constitutional." *Ante,* at 1772. This statement simply begs the question. Were the Court to read § 1008 to prohibit only the actual performance of abortions with Title X funds—as, indeed, the Secretary did until February 2, 1988, see 53 Fed.Reg. 2923 (1988)—the provision would fall within the category of restrictions that the Court upheld in *Harris v. McRae,* 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980), and *Maher v. Roe,* 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977). By interpreting the statute to authorize the regulation of abortion-related speech between physician and patient, however, the Secretary, and now the Court, have rejected a constitutionally sound construction in favor of one that is by no means clearly constitutional.

***207** Thus, this is not a situation in which "the intention of Congress is revealed too distinctly to permit us to ignore it because of mere misgivings as to power." *George Moore Ice Cream Co. v. Rose,* 289 U.S. 373, 379, 53 S.Ct. 620, 622, 77 L.Ed. 1265 (1933). Indeed, it would appear that our duty to avoid passing unnecessarily upon important constitutional questions is strongest where, as here, the language of the statute is decidedly ambiguous. It is both logical and eminently prudent to assume that when Congress intends to press the limits of constitutionality in its enactments, it will express ****1780** that intent in explicit and unambiguous terms. See Sunstein, Law and Administration After *Chevron,* 90 Colum.L.Rev. 2071, 2113 (1990) ("It is thus implausible that, after *Chevron,* agency interpretations of ambiguous statutes will prevail even if the consequence of those interpretations is to produce invalidity or to raise serious constitutional doubts").

Because I conclude that a plainly constitutional construction of § 1008 "is not only 'fairly possible' but entirely reasonable," *Machinists,* 367 U.S., at 750, 81 S.Ct., at 1790, I would reverse the judgment of the Court of Appeals on this ground without deciding the constitutionality of the Secretary's regulations.

II

I also strongly disagree with the majority's disposition of petitioners' constitutional claims, and because I feel that a response thereto is indicated, I move on to that issue.

A

Until today, the Court never has upheld viewpoint-based suppression of speech simply because that suppression was a condition upon the acceptance of public funds. Whatever may be the Government's power to condition the receipt of its largess upon the relinquishment of constitutional rights, it surely does not extend to a condition that suppresses the recipient's cherished freedom of speech based solely upon the content or viewpoint of that speech. *Speiser v. Randall,* 357 U.S.

513, 518–519, 78 S.Ct. 1332, 1338, 2 L.Ed.2d 1460 (1958) ("To deny an exemption to claimants ***208** who engage in certain forms of speech is in effect to penalize them for such speech.... The denial is 'frankly aimed at the suppression of dangerous ideas,' " quoting *American Communications Assn. v. Douds,* 339 U.S. 382, 402, 70 S.Ct. 674, 685, 94 L.Ed. 925 (1950)). See *Cammarano v. United States,* 358 U.S. 498, 513, 79 S.Ct. 524, 533, 3 L.Ed.2d 462 (1959). See also *FCC v. League of Women Voters of Cal.,* 468 U.S. 364, 407, 104 S.Ct. 3106, 3131, 82 L.Ed.2d 278 (1984) (REHNQUIST, J., dissenting). Cf. *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 237, 107 S.Ct. 1722, 1731, 95 L.Ed.2d 209 (1987) (SCALIA, J., dissenting). This rule is a sound one, for, as the Court often has noted: " 'A regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a "law ... abridging the freedom of speech, or of the press." ' " *League of Women Voters,* 468 U.S., at 383–384, 104 S.Ct., at 3119, quoting *Consolidated Edison Co. of N.Y. v. Public Service Comm'n of N.Y.,* 447 U.S. 530, 546, 100 S.Ct. 2326, 2338, 65 L.Ed.2d 319 (1980) (STEVENS, J., concurring in judgment). "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 95, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212 (1972).

Nothing in the Court's opinion in *Regan v. Taxation with Representation of Washington,* 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983), can be said to challenge this long-settled understanding. In *Regan,* the Court upheld a content-neutral provision of the Internal Revenue Code, 26 U.S.C. § 501(c)(3), that disallowed a particular tax-exempt status to organizations that "attempt[ed] to influence legislation," while affording such status to veterans' organizations irrespective of their lobbying activities. Finding the case controlled by *Cammarano, supra,* the Court explained: "The case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to ' "ai[m] at the suppression of dangerous ideas." ' ... We find no indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect." 461 U.S., at 548, 103 S.Ct., at 2002, quoting ***209** *Cammarano,* 358 U.S., at 513, 79 S.Ct., at 533, in turn quoting *Speiser,* 357 U.S., at 519, 78 S.Ct., at 1338. The separate concurrence in *Regan* joined the Court's opinion precisely "[b]ecause 26 U.S.C. § 501's discrimination ****1781** between veterans' organizations and charitable organizations is not based on the content of their speech." 461 U.S., at 551, 103 S.Ct., at 2004.

It cannot seriously be disputed that the counseling and referral provisions at issue in the present cases constitute content-based regulation of speech. Title X grantees may provide counseling and referral regarding any of a wide range of family planning and other topics, save abortion. Cf. *Consolidated Edison Co.,* 447 U.S., at 537, 100 S.Ct., at 2333 ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic"); *Boos v. Barry,* 485 U.S. 312, 319, 108 S.Ct. 1157, 1163, 99 L.Ed.2d 333 (1988) (opinion of O'CONNOR, J.) (same).

The regulations are also clearly viewpoint based. While suppressing speech favorable to abortion with one hand, the Secretary compels antiabortion speech with the other. For example, the Department of Health and Human Services' own description of the regulations makes plain that "Title X projects are *required* to facilitate access to prenatal care and social services, including adoption services, that might be needed by the pregnant client to promote her well-being and that of her child, while making it abundantly clear that the project is not permitted to promote abortion by facilitating access to abortion through the referral process." 53 Fed.Reg. 2927 (1988) (emphasis added).

Moreover, the regulations command that a project refer for prenatal care each woman diagnosed as pregnant, irrespective of the woman's expressed desire to continue or terminate her pregnancy. 42 CFR § 59.8(a)(2) (1990). If a client asks directly about abortion, a Title X physician or counselor is required to say, in essence, that the project does not consider abortion to be an appropriate method of family planning. § 59.8(b)(4). Both requirements are antithetical to ***210** the First Amendment. See *Wooley v. Maynard,* 430 U.S. 705, 714, 97 S.Ct. 1428, 1435, 51 L.Ed.2d 752 (1977).

The regulations pertaining to "advocacy" are even more explicitly viewpoint based. These provide: "A Title X project may not *encourage, promote or advocate* abortion as a method of family planning." § 59.10 (emphasis added). They explain: "This requirement prohibits actions to *assist* women to obtain abortions or *increase* the

availability or accessibility of abortion for family planning purposes." § 59.10(a) (emphasis added). The regulations do not, however, proscribe or even regulate anti-abortion advocacy. These are clearly restrictions aimed at the suppression of "dangerous ideas."

Remarkably, the majority concludes that "the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other." *Ante,* at 1772. But the majority's claim that the regulations merely limit a Title X project's speech to preventive or preconceptional services, *ibid.,* rings hollow in light of the broad range of nonpreventive services that the regulations authorize Title X projects to provide. [2] By refusing to fund those family-planning projects that advocate abortion *because* they advocate abortion, the Government plainly has targeted a particular viewpoint. Cf. *Ward v. Rock Against Racism,* 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). The majority's reliance on the fact that the regulations pertain solely to funding decisions simply begs the question. Clearly, there are some bases upon which government may not rest its decision to fund or not to fund. For example, the Members of the majority surely would agree that government may not base its ***211** decision to support an activity upon considerations of ****1782** race. See, *e.g., Yick Wo v. Hopkins,* 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). As demonstrated above, our cases make clear that ideological viewpoint is a similarly repugnant ground upon which to base funding decisions.

2 In addition to requiring referral for prenatal care and adoption services, the regulations permit general health services such as physical examinations, screening for breast cancer, treatment of gynecological problems, and treatment for sexually transmitted diseases. 53 Fed.Reg. 2927 (1988). None of the latter are strictly preventive, preconceptional services.

The majority's reliance upon *Regan* in this connection is also misplaced. That case stands for the proposition that government has no obligation to subsidize a private party's efforts to petition the legislature regarding its views. Thus, if the challenged regulations were confined to non-ideological limitations upon the use of Title X funds for lobbying activities, there would exist no violation of the First Amendment. The advocacy regulations at issue here, however, are not limited to lobbying but extend to all speech having the effect of encouraging, promoting, or advocating abortion as a method of family planning. 42 CFR § 59.10(a) (1990). Thus, in addition to their impermissible focus upon the viewpoint of regulated speech, the provisions intrude upon a wide range of communicative conduct, including the very words spoken to a woman by her physician. By manipulating the content of the doctor-patient dialogue, the regulations upheld today force each of the petitioners "to be an instrument for fostering public adherence to an ideological point of view [he or she] finds unacceptable." *Wooley v. Maynard,* 430 U.S., at 715, 97 S.Ct., at 1435. This type of intrusive, ideologically based regulation of speech goes far beyond the narrow lobbying limitations approved in *Regan* and cannot be justified simply because it is a condition upon the receipt of a governmental benefit. [3]

3 The majority attempts to obscure the breadth of its decision through its curious contention that "the Title X program regulations do not significantly impinge upon the doctor-patient relationship." *Ante,* at 1776. That the doctor-patient relationship is substantially burdened by a rule prohibiting the dissemination by the physician of pertinent medical information is beyond serious dispute. This burden is undiminished by the fact that the relationship at issue here is not an "all-encompassing" one. A woman seeking the services of a Title X clinic has every reason to expect, as do we all, that her physician will not withhold relevant information regarding the very purpose of her visit. To suggest otherwise is to engage in uninformed fantasy. Further, to hold that the doctor-patient relationship is somehow incomplete where a patient lacks the resources to seek comprehensive health care from a single provider is to ignore the situation of a vast number of Americans. As Justice MARSHALL has noted in a different context: "It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live." *United States v. Kras,* 409 U.S. 434, 460, 93 S.Ct. 631, 646, 34 L.Ed.2d 626 (1973) (dissenting opinion).

***212** B

The Court concludes that the challenged regulations do not violate the First Amendment rights of Title X staff members because any limitation of the employees' freedom of expression is simply a consequence of their decision to accept employment at a federally funded

project. *Ante,* at 1775. But it has never been sufficient to justify an otherwise unconstitutional condition upon public employment that the employee may escape the condition by relinquishing his or her job. It is beyond question "that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment." *Abood v. Detroit Bd. of Ed.,* 431 U.S. 209, 234, 97 S.Ct. 1782, 1799, 52 L.Ed.2d 261 (1977), citing *Elrod v. Burns,* 427 U.S. 347, 357–360, 96 S.Ct. 2673, 2681–2683, 49 L.Ed.2d 547 (1976), and cases cited therein; *Perry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Keyishian v. Board of Regents, State Univ. of N.Y.,* 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967). Nearly two decades ago, it was said:

> "For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons ****1783** upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a ***213** person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' " *Perry v. Sindermann,* 408 U.S., at 597, 92 S.Ct., at 2697, quoting *Speiser v. Randall,* 357 U.S., at 526, 78 S.Ct., at 1342.

The majority attempts to circumvent this principle by emphasizing that Title X physicians and counselors "remain free ... to pursue abortion-related activities when they are not acting under the auspices of the Title X project." *Ante,* at 1775. "The regulations," the majority explains, "do not in any way restrict the activities of those persons acting as private individuals." *Ibid.* Under the majority's reasoning, the First Amendment could be read to tolerate *any* governmental restriction upon an employee's speech so long as that restriction is limited to the funded workplace. This is a dangerous proposition, and one the Court has rightly rejected in the past.

In *Abood,* it was no answer to the petitioners' claim of compelled speech as a condition upon public employment that their speech outside the workplace remained unregulated by the State. Nor was the public employee's First Amendment claim in *Rankin v. McPherson,* 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987), derogated because the communication that her employer sought to punish occurred during business hours. At the least, such conditions require courts to balance the speaker's interest in the message against those of government in preventing its dissemination. *Id.,* at 384, 107 S.Ct., at 2896; *Pickering v. Board of Ed. of Township High School Dist.,* 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968).

In the cases at bar, the speaker's interest in the communication is both clear and vital. In addressing the family-planning needs of their clients, the physicians and counselors who staff Title X projects seek to provide them with the full range of information and options regarding their health and reproductive freedom. Indeed, the legitimate expectations ***214** of the patient and the ethical responsibilities of the medical profession demand no less. "The patient's right of self-decision can be effectively exercised only if the patient possesses enough information to enable an intelligent choice.... The physician has an ethical obligation to help the patient make choices from among the therapeutic alternatives consistent with good medical practice." Current Opinions, Council on Ethical and Judicial Affairs of American Medical Association ¶ 8.08 (1989). See also President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Making Health Care Decisions 70 (1982); American College of Obstetricians & Gynecologists, Standards for Obstetric–Gynecologic Services 62 (7th ed. 1989). When a client becomes pregnant, the full range of therapeutic alternatives includes the abortion option, and Title X counselors' interest in providing this information is compelling.

The Government's articulated interest in distorting the doctor-patient dialogue—ensuring that federal funds are not spent for a purpose outside the scope of the program—falls far short of that necessary to justify the suppression of truthful information and professional medical opinion regarding constitutionally protected conduct.[4] Moreover, the offending regulation is not narrowly tailored to serve this interest. For example, the governmental interest at stake could be served by imposing rigorous bookkeeping ****1784** standards to ensure financial separation or adopting content-neutral rules for the balanced dissemination of family-planning and health information. See *Massachusetts v. Secretary*

of Health and Human Services, 899 F.2d 53, 74 (CA1 1990), cert. pending, No. 89–1929. By failing to balance or even to consider the free speech interests claimed by Title X physicians against the Government's asserted interest in suppressing the speech, the Court falters in its duty to implement the protection ***215** that the First Amendment clearly provides for this important message.

4 It is to be noted that the Secretary has made no claim that the regulations at issue reflect any concern for the health or welfare of Title X clients.

C

Finally, it is of no small significance that the speech the Secretary would suppress is truthful information regarding constitutionally protected conduct of vital importance to the listener. One can imagine no legitimate governmental interest that might be served by suppressing such information. Concededly, the abortion debate is among the most divisive and contentious issues that our Nation has faced in recent years. "But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628 (1943).

III

By far the most disturbing aspect of today's ruling is the effect it will have on the Fifth Amendment rights of the women who, supposedly, are beneficiaries of Title X programs. The majority rejects petitioners' Fifth Amendment claims summarily. It relies primarily upon the decisions in *Harris v. McRae,* 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980), and *Webster v. Reproductive Health Services,* 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989). There were dissents in those cases, and we continue to believe that they were wrongly and unfortunately decided. Be that as it may, even if one accepts as valid the Court's theorizing in those cases, the majority's reasoning in the present cases is flawed.

Until today, the Court has allowed to stand only those restrictions upon reproductive freedom that, while limiting the availability of abortion, have left intact a woman's ability to decide without coercion whether she will continue her pregnancy to term. *Maher v. Roe,* 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977), *McRae,* and *Webster* are all to this effect. Today's decision abandons that principle, and with disastrous results.

***216** Contrary to the majority's characterization, this is not a situation in which individuals seek Government aid in exercising their fundamental rights. The Fifth Amendment right asserted by petitioners is the right of a pregnant woman to be free from affirmative governmental *interference* in her decision. *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and its progeny are not so much about a medical procedure as they are about a woman's fundamental right to self-determination. Those cases serve to vindicate the idea that "liberty," if it means anything, must entail freedom from governmental domination in making the most intimate and personal of decisions. See, *e.g., Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416, 444, 103 S.Ct. 2481, 2500, 76 L.Ed.2d 687 (1983) (governmental interest in ensuring that pregnant women receive medically relevant information "will not justify abortion regulations designed to influence the woman's informed choice between abortion or childbirth"); *Maher v. Roe,* 432 U.S., at 473, 97 S.Ct., at 2382 (noting that the Court's abortion cases "recognize a constitutionally protected interest 'in making certain kinds of important decisions' free from governmental compulsion," quoting *Whalen v. Roe,* 429 U.S. 589, 599, 97 S.Ct. 869, 876, 51 L.Ed.2d 64 (1977)); see also *Harris v. McRae,* 448 U.S., at 312, 100 S.Ct., at 2685; ****1785** *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, 759, 106 S.Ct. 2169, 2178, 90 L.Ed.2d 779 (1986); *Roe v. Wade,* 410 U.S., at 169–170, 93 S.Ct., at 735 (Stewart, J., concurring). By suppressing medically pertinent information and injecting a restrictive ideological message unrelated to considerations of maternal health, the Government places formidable obstacles in the path of Title X clients' freedom of choice and thereby violates their Fifth Amendment rights.

It is crystal clear that the aim of the challenged provisions —an aim the majority cannot escape noticing—is not simply to ensure that federal funds are not used to perform abortions, but to "reduce the incidence of abortion." 42 CFR § 59.2 (1990) (in definition of "family planning"). As recounted above, the regulations require Title X physicians and counselors to provide information

pertaining only to childbirth, ***217** to refer a pregnant woman for prenatal care irrespective of her medical situation, and, upon direct inquiry, to respond that abortion is not an "appropriate method" of family planning.

The undeniable message conveyed by this forced speech, and the one that the Title X client will draw from it, is that abortion nearly always is an improper medical option. Although her physician's words, in fact, are strictly controlled by the Government and wholly unrelated to her particular medical situation, the Title X client will reasonably construe them as professional advice to forgo her right to obtain an abortion. As would most rational patients, many of these women will follow that perceived advice and carry their pregnancy to term, despite their needs to the contrary and despite the safety of the abortion procedure for the vast majority of them. Others, delayed by the regulations' mandatory prenatal referral, will be prevented from acquiring abortions during the period in which the process is medically sound and constitutionally protected.

In view of the inevitable effect of the regulations, the majority's conclusion that "[t]he difficulty that a woman encounters when a Title X project does not provide abortion counseling or referral leaves her in no different position than she would have been if the Government had not enacted Title X," *ante,* at 1777, is insensitive and contrary to common human experience. Both the purpose and result of the challenged regulations are to deny women the ability voluntarily to decide their procreative destiny. For these women, the Government will have obliterated the freedom to choose as surely as if it had banned abortions outright. The denial of this freedom is not a consequence of poverty but of the Government's ill-intentioned distortion of information it has chosen to provide. [5]

5 In the context of common-law tort liability, commentators have recognized: "If there is no duty to go to the assistance of a person in difficulty or peril, there is at least a duty to avoid any affirmative acts which make his situation worse.... The same is true, of course, of a physician who accepts a charity patient. Such a defendant will then be liable for a failure to use reasonable care for the protection of the plaintiff's interests." W. Keeton, D. Dodds, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 56, p. 378 (5th ed. 1984) (footnotes omitted). This observation seems equally appropriate to the cases at bar.

***218** The substantial obstacles to bodily self-determination that the regulations impose are doubly offensive because they are effected by manipulating the very words spoken by physicians and counselors to their patients. In our society, the doctor-patient dialogue embodies a unique relationship of trust. The specialized nature of medical science and the emotional distress often attendant to health-related decisions requires that patients place their complete confidence, and often their very lives, in the hands of medical professionals. One seeks a physician's aid not only for medication or diagnosis, but also for guidance, professional judgment, and vital emotional support. Accordingly, each of us attaches profound importance and authority to the words of advice spoken by the physician.

It is for this reason that we have guarded so jealously the doctor-patient dialogue from governmental intrusion. "[I]n *Roe* and subsequent cases we have 'stressed repeatedly ****1786** the central role of the physician, both in consulting with the woman about whether or not to have an abortion, and in determining how any abortion was to be carried out.' " *Akron,* 462 U.S., at 447, 103 S.Ct., at 2501, quoting *Colautti v. Franklin,* 439 U.S. 379, 387, 99 S.Ct. 675, 681, 58 L.Ed.2d 596 (1979). See also *Thornburgh,* 476 U.S., at 763, 106 S.Ct., at 2180. The majority's approval of the Secretary's regulations flies in the face of our repeated warnings that regulations tending to "confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession," cannot endure. *Planned Parenthood of Central Mo. v. Danforth,* 428 U.S. 52, 67, n. 8, 96 S.Ct. 2831, 2840, n. 8, 49 L.Ed.2d 788 (1976).

The majority attempts to distinguish our holdings in *Akron* and *Thornburgh* on the *post hoc* basis that the governmental ***219** intrusions into the doctor-patient dialogue invalidated in those cases applied to *all* physicians within a jurisdiction while the regulations now before the Court pertain to the narrow class of healthcare professionals employed at Title X projects. *Ante,* at 1777. But the rights protected by the Constitution are *personal* rights. *Loving v. Virginia,* 388 U.S. 1, 12, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967); *Shelley v. Kraemer,* 334 U.S. 1, 22, 68 S.Ct. 836, 846, 92 L.Ed. 1161 (1948). And for the individual woman, the deprivation of liberty by

the Government is no less substantial because it affects few rather than many. It cannot be that an otherwise unconstitutional infringement of choice is made lawful because it touches only some of the Nation's pregnant women and not all of them.

The manipulation of the doctor-patient dialogue achieved through the Secretary's regulations is clearly an effort "to deter a woman from making a decision that, with her physician, is hers to make." *Thornburgh,* 476 U.S., at 759, 106 S.Ct., at 2178. As such, it violates the Fifth Amendment. [6]

6 Significantly, the Court interprets the challenged regulations to allow a Title X project to refer a woman whose health would be seriously endangered by continued pregnancy to an abortion provider. *Ante,* at 1773. To hold otherwise would be to adopt an interpretation that would most certainly violate a patient's right to substantive due process. See, *e.g., Youngberg v. Romeo,* 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982); *Revere v. Massachusetts General Hospital,* 463 U.S. 239, 103 S.Ct. 2979, 77 L.Ed.2d 605 (1983). The Solicitor General at oral argument, however, afforded the regulations a far less charitable interpretation. See Tr. of Oral Arg. 44–47.

IV

In its haste further to restrict the right of every woman to control her reproductive freedom and bodily integrity, the majority disregards established principles of law and contorts this Court's decided cases to arrive at its preordained result. The majority professes to leave undisturbed the free speech protections upon which our society has come to rely, but one must wonder what force the First Amendment retains if it is read to countenance the deliberate manipulation by the Government ***220** of the dialogue between a woman and her physician. While technically leaving intact the fundamental right protected by *Roe v. Wade,* the Court, "through a relentlessly formalistic catechism," *McRae,* 448 U.S., at 341, 100 S.Ct., at 2707–2708 (MARSHALL, J., dissenting), once again has rendered the right's substance nugatory. See *Webster v. Reproductive Health Services,* 492 U.S., at 537, 560, 109 S.Ct., at 3067, 3079 (opinions concurring in part and dissenting in part). This is a course nearly as noxious as overruling *Roe* directly, for if a right is found to be unenforceable, even against flagrant attempts by government to circumvent it, then it ceases to be a right at all. This, I fear, may be the effect of today's decision.

Justice STEVENS, dissenting.
In my opinion, the Court has not paid sufficient attention to the language of the controlling statute or to the consistent interpretation accorded the statute by the responsible ****1787** cabinet officers during four different Presidencies and 18 years.

The relevant text of the "Family Planning Services and Population Research Act of 1970" has remained unchanged since its enactment. 84 Stat. 1504. The preamble to the Act states that it was passed:

> "To promote public health and welfare by expanding, improving, and better coordinating the family planning services and population research activities of the Federal Government, and for other purposes." *Ibid.*

The declaration of congressional purposes emphasizes the importance of educating the public about family planning services. Thus, § 2 of the Act states, in part, that the purpose of the Act is:

> "(1) to assist in making comprehensive voluntary family planning services readily available to all persons desiring such services;

. . . . .

> "(5) to develop and make readily available information (including educational materials) on family planning and ***221** population growth to all persons desiring such information." 42 U.S.C. § 300 (Congressional Declaration of Purpose).

In contrast to the statutory emphasis on making relevant information readily available to the public, the statute contains no suggestion that Congress intended to authorize the suppression or censorship of any information by any Government employee or by any grant recipient.

Section 6 of the Act authorizes the provision of federal funds to support the establishment and operation of voluntary family planning projects. The section also empowers the Secretary to promulgate regulations imposing conditions on grant recipients to ensure that "such grants will be effectively utilized for the purposes

for which made." § 300a–4(b). Not a word in the statute, however, authorizes the Secretary to impose any restrictions on the dissemination of truthful information or professional advice by grant recipients.

The word "prohibition" is used only once in the Act. Section 6, which adds to the Public Health Service Act the new Title X, covering the subject of population research and voluntary planning programs, includes the following provision:

"PROHIBITION OF ABORTION

> "SEC. 1008. None of the funds appropriated under this title shall be used in programs where abortion is a method of family planning." 84 Stat. 1508, 42 U.S.C. § 300a–6.
>
> Read in the context of the entire statute, this prohibition is plainly directed at conduct, rather than the dissemination of information or advice, by potential grant recipients.

The original regulations promulgated in 1971 by the Secretary of Health, Education, and Welfare so interpreted the statute. This " 'contemporaneous construction of [the] statute by the men charged with the responsibility of setting its machinery in motion' " is entitled to particular respect. See *Power Reactor Development* ***222** *Co. v. Electrical Workers,* 367 U.S. 396, 408, 81 S.Ct. 1529, 1535, 6 L.Ed.2d 924 (1961); *Udall v. Tallman,* 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965); *Aluminum Co. of America v. Central Lincoln Peoples' Utility Dist.,* 467 U.S. 380, 390, 104 S.Ct. 2472, 2479, 81 L.Ed.2d 301 (1984). The regulations described the kind of services that grant recipients had to provide in order to be eligible for federal funding, but they did not purport to regulate or restrict the kinds of advice or information that recipients might make available to their clients. Conforming to the language of the governing statute, the regulations provided that "[t]he project will not *provide* abortions as a method of family planning." 42 CFR § 59.5(a)(9) (1972) (emphasis added). Like the statute itself, the regulations prohibited conduct, not speech.

The same is true of the regulations promulgated in 1986 by the Secretary of Health ****1788** and Human Services. They also prohibited grant recipients from performing abortions but did not purport to censor or mandate any kind of speech. See 42 CFR §§ 59.1–59.13 (1986).

The entirely new approach adopted by the Secretary in 1988 was not, in my view, authorized by the statute. The new regulations did not merely reflect a change in a policy determination that the Secretary had been authorized by Congress to make. Cf. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 865, 104 S.Ct. 2778, 2792, 81 L.Ed.2d 694 (1984). Rather, they represented an assumption of policymaking responsibility that Congress had not delegated to the Secretary. See *id.,* at 842–843, 104 S.Ct., at 2781–2782 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress"). In a society that abhors censorship and in which policymakers have traditionally placed the highest value on the freedom to communicate, it is unrealistic to conclude that statutory authority to regulate conduct implicitly authorized the Executive to regulate speech.

Because I am convinced that the 1970 Act did not authorize the Secretary to censor the speech of grant recipients or their ***223** employees, I would hold the challenged regulations invalid and reverse the judgment of the Court of Appeals.

Even if I thought the statute were ambiguous, however, I would reach the same result for the reasons stated in Justice O'CONNOR's dissenting opinion. As she also explains, if a majority of the Court had reached this result, it would be improper to comment on the constitutional issues that the parties have debated. Because the majority has reached out to decide the constitutional questions, however, I am persuaded that Justice BLACKMUN is correct in concluding that the majority's arguments merit a response. I am also persuaded that Justice BLACKMUN has correctly analyzed these issues. I have therefore joined Parts II and III of his opinion.

Justice O'CONNOR, dissenting.

"[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council,* 485 U.S. 568, 575, 108 S.Ct. 1392, 1397, 99 L.Ed.2d 645 (1988). Justice BLACKMUN has explained well why this longstanding canon of statutory construction applies in these cases, and

I join Part I of his dissent. Part II demonstrates why the challenged regulations, which constitute the Secretary's interpretation of § 1008 of the Public Health Service Act, 84 Stat. 1508, 42 U.S.C. § 300a–6, "raise serious constitutional problems": the regulations place content-based restrictions on the speech of Title X fund recipients, restrictions directed precisely at speech concerning one of "the most divisive and contentious issues that our Nation has faced in recent years." *Ante,* at 1784.

One may well conclude, as Justice BLACKMUN does in Part II, that the regulations are unconstitutional for this reason. I do not join Part II of the dissent, however, for the same reason that I do not join Part III, in which Justice ***224** BLACKMUN concludes that the regulations are unconstitutional under the Fifth Amendment. The canon of construction that Justice BLACKMUN correctly applies here is grounded in large part upon our time-honored practice of not reaching constitutional questions unnecessarily. See *DeBartolo, supra,* at 575, 108 S.Ct., at 1397. "It is a fundamental rule of judicial restraint ... that this Court will not reach constitutional questions in advance of the necessity of deciding them." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.,* 467 U.S. 138, 157, 104 S.Ct. 2267, 2279, 81 L.Ed.2d 113 (1984). See also ****1789** *Alexander v. Louisiana,* 405 U.S. 625, 633, 92 S.Ct. 1221, 1226, 31 L.Ed.2d 536 (1972); *Burton v. United States,* 196 U.S. 283, 295, 25 S.Ct. 243, 245, 49 L.Ed. 482 (1905); *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration,* 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899 (1885) (In the exercise of its jurisdiction to pronounce unconstitutional laws of the United States, this Court "has rigidly adhered" to the rule "never to anticipate a question of constitutional law in advance of the necessity of deciding it").

This Court acts at the limits of its power when it invalidates a law on constitutional grounds. In recognition of our place in the constitutional scheme, we must act with "great gravity and delicacy" when telling a coordinate branch that its actions are absolutely prohibited absent constitutional amendment. *Adkins v. Children's Hospital of District of Columbia,* 261 U.S. 525, 544, 43 S.Ct. 394, 396, 67 L.Ed. 785 (1923). See also *Blodgett v. Holden,* 275 U.S. 142, 147–148, 48 S.Ct. 105, 106–107, 72 L.Ed. 206 (1927) (Holmes, J., concurring). In these cases, we need only tell the Secretary that his regulations are not a reasonable interpretation of the statute; we need not tell Congress that it cannot pass such legislation. If we rule solely on statutory grounds, Congress retains the power to force the constitutional question by legislating more explicitly. It may instead choose to do nothing. That decision should be left to Congress; we should not tell Congress what it cannot do before it has chosen to do it. It is enough in this litigation to conclude that neither the language nor the history of § 1008 compels the Secretary's interpretation, ***225** and that the interpretation raises serious First Amendment concerns. On this basis alone, I would reverse the judgment of the Court of Appeals and invalidate the challenged regulations.

All Citations

500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233, 59 USLW 4451

789 F.Supp.2d 172
United States District Court, D. Maine.

John NEWTON, et al., Plaintiffs,
v.
Paul LePAGE, et al., Defendants.

No. 1:11–cv–00124–JAW.
|
April 22, 2011.

Synopsis
Background: Plaintiffs brought action against Maine's governor and commissioner of Maine Department of Labor, alleging breach of fiduciary duties and violation of First Amendment based on removal of mural depicting Maine's labor history from lobby of Maine Department of Labor. Plaintiffs moved for temporary restraining order (TRO).

[Holding:] The District Court, John A. Woodcock, Jr., Chief Judge, held that mural was government speech, and thus defendants' removal of mural was not subject to Free Speech Clause's restriction on government regulation of private speech.

Motion denied.

West Headnotes (6)

[1] **Injunction**
Grounds in general;multiple factors

212 Injunction
212III Temporary Restraining Orders in General
212III(B) Factors Considered in General
212k1132 Grounds in general;multiple factors
(Formerly 212k150)

To determine whether to issue a temporary restraining order, the Court applies the same four-factor analysis used to evaluate a motion for preliminary injunction, whereby the movant must demonstrate: (1) it will likely succeed on the merits; (2) it will suffer irreparable harm if the injunction is denied; (3) the harm it will suffer outweighs any harm to [the defendant] that would be caused by injunctive relief; and, (4) the effect on the public interest weighs in its favor.

8 Cases that cite this headnote

[2] **Injunction**
Entitlement to relief;likelihood of success

212 Injunction
212III Temporary Restraining Orders in General
212III(B) Factors Considered in General
212k1134 Entitlement to relief;likelihood of success
(Formerly 212k150)

The sine qua non of the four-part inquiry to determine whether to issue a temporary restraining order is likelihood of success on the merits, and if the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity.

2 Cases that cite this headnote

[3] **Constitutional Law**
Government-sponsored speech

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1563 Government-sponsored speech

The government speech doctrine is neither aberrational nor novel. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[4] **Constitutional Law**
Government Property and Events

States
Control and regulation of public buildings and places

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1730 In general
360 States
360III Property, Contracts, and Liabilities
360k88 Control and regulation of public buildings and places

Mural depicting Maine's labor history, located in lobby of Maine Department of Labor, was government speech, and thus, governor's removal of mural from lobby was not subject to Free Speech Clause's restriction on government regulation of private speech, even though mural was created by private artist; mural was permanent, publicly-financed, displayed on public property, designed as means of expression, through which government wished to convey some thought or instill some feeling in those who viewed work, state involvement in mural was substantial, visitor was likely to view mural as expression of government point of view about organized labor given mural's location, Department controlled process by which artist and theme were selected, and viewpoint of mural dominated available public space within lobby and interfered permanently with other uses of public space. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[5] **Civil Rights**
Public accommodations or facilities
78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1457 Preliminary Injunction
78k1457(2) Public accommodations or facilities

Plaintiffs in action against governor of Maine and commissioner of Maine Department of Labor, alleging violation of First Amendment based on defendants' removal of mural depicting Maine's labor history from lobby of Maine Department of Labor, would not suffer irreparable harm if district court denied requested temporary restraining order (TRO) directing defendants to reveal location of mural, to report condition of mural, and to return mural to public exhibit, as required to support issuance of TRO; denial of TRO was unlikely to cause any loss of First Amendment freedoms, for even minimal periods of time, as plaintiffs' counsel conceded that none of individual plaintiffs was likely to visit Department of Labor within time it took court to issue ruling on TRO or before court issued more contemplative order on motion for preliminary injunction. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[6] **Constitutional Law**
Political Questions
92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)5 Political Questions
92k2580 In general

Even though the political question doctrine is famously murky, courts should avoid undertaking tasks assigned to the political branches.

Cases that cite this headnote

Attorneys and Law Firms

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Opinion

ORDER ON MOTION FOR TEMPORARY RESTRAINING ORDER

JOHN A. WOODCOCK, JR., Chief Judge.

Under clear United States Supreme Court precedent, when the government speaks, it is not subject to the Free Speech Clause of the First Amendment. [1] This principle applies to elected state leaders; they have the right to

decide what to say and what not to say, and by extension during their term in office, they are authorized to decide what the state of Maine says or does not say about itself. State of Maine Governor Paul LePage's removal of a mural from the walls of a state office because he disagreed with its contents may strike some as state censorship; instead, it is a constitutionally permissible exercise of gubernatorial authority. Though his action provoked a storm of constitutionally-protected speech with a stark division between those who applauded his decision as rebalancing the state of Maine's message to the business community and those who condemned his action as muzzling opposing viewpoints, the resolution of this vigorous debate must not rest with judicial authority of a federal court. It must rest instead with the ultimate authority of the people of the state of Maine to choose their leaders.

1 Government speech remains restrained by the Establishment Clause of the First Amendment. *Pleasant Grove City, Utah v. Summum,* 555 U.S. 460, 129 S.Ct. 1125, 1131–32, 172 L.Ed.2d 853 (2009). This case does not raise Establishment Clause implications, and nothing in this opinion deals with the nature of the Establishment Clause's restraint on government speech.

I. STATEMENT OF FACTS

A. Procedural History

On April 1, 2011, John Newton, Donald Berry, Jonathan Beal, Joan Braun, Natasha Mayers, and Robert Shetterly (Plaintiffs) filed a complaint against Paul LePage in his capacity as Governor of Maine, ***174** Laura Boyette in her capacity as Acting Commissioner of the Maine Department of Labor, and Joseph Phillips in his capacity as Director of the Maine State Museum (Defendants). *Compl.* (Docket # 1). The Complaint alleges a breach of fiduciary duties, a violation of the Maine Administrative Procedure Act, and a violation of the First Amendment to the United States Constitution stemming from the Defendants' removal of a mural depicting Maine's labor history (the mural) from the lobby of the Maine Department of Labor (MDOL). *Id.* The Plaintiffs seek injunctive relief and monetary damages. *Id.* On April 8, 2011, the Plaintiffs filed an amended complaint adding an allegation that the Defendants violated the Plaintiffs' procedural Due Process rights. *First. Am. Compl.* (Docket # 8).

That same day, the Plaintiffs moved for a temporary restraining order (TRO). *Pls.' Mot for TRO* (Docket # 9) (*Pls.' Mot*). They requested the Court direct the Defendants to

> (1) reveal the location of the Mural to the Court and to the Plaintiffs,
>
> (2) instruct the person presently in possession or control of the Mural to take all steps necessary to preserve and protect the Mural, to assess the present condition of the Mural, and to report the condition of the Mural to the Court and to the Plaintiffs, and (3) take all reasonable steps, consistent with the Court's findings and orders, to return the Mural to public exhibit at its permanent location in the MDOL.

Pls.' Mot. at 20. The Defendants responded in opposition to the motion on April 11, 2011. *State Defs.' Objection to Mot. for TRO* (Docket # 12) (*Defs.' Resp.*) On April 11, 2011, the Court held a telephone conference with the parties in which it granted the Plaintiffs leave to file a reply and the Defendants leave to file a sur-reply. It also scheduled a hearing on the TRO for April 19, 2011. On April 13, 2011, the Plaintiffs filed their reply to the Defendants' objection. *Pls.' Reply to Defs.' Objection to Mot for a TRO* (Docket # 18) (*Pls.' Reply*). On April 15, 2011, the Defendants filed their sur-reply. *State Defs.' Surreply in Opp'n to Mot. for a TRO* (Docket # 22) (*Defs.' Sur-reply*). The Court held oral argument as scheduled on April 19, 2011.

B. The Parties' Contentions

1. The Plaintiffs' Motion

The Plaintiffs' premise their request for a TRO exclusively on the Defendants' alleged First Amendment violations. *Pls.' Mot.* at 4. The Plaintiffs argue that a TRO is appropriate because their First Amendment action is likely to succeed on its merits. *Id.* at 5. They assert that the mural is an "expressive work shielded by the First Amendment," citing case law indicating that paintings, music, literary verse, and non-verbal actions are entitled to First Amendment protection *Id.* at 5–6. They contend that the mural's depiction of historical images of Maine's labor history "is a nonverbal but nonetheless effective way to communicate ideas to the public." *Id.* at 6.

The Plaintiffs further argue that the removal of the mural from the MDOL lobby infringes their First Amendment right to receive ideas expressed by the mural. *Id.* They assert that the First Amendment "necessarily protects not only the source's right to expression, but also the recipient's corollary right to receive information and ideas." *Id.* at 6–7. They quote the United States Supreme Court's statement that "the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom." *Id.* at 7–8 (quoting *Bd. of Educ., Island Trees* ***175** *Union Free Sch. Dist. No. 26 v. Pico,* 457 U.S. 853, 867, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982)).

The Plaintiffs focus on the Defendants' reasons for removing the mural. They assert that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content," and reason that the removal of the mural was a First Amendment violation because it was based on the content and viewpoint of the mural. *Id.* at 8 (quoting *Police Dep't of City of Chicago v. Mosley,* 408 U.S. 92, 95, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972)). They argue that content-based restrictions are presumptively invalid and subject to strict scrutiny, and that "[w]ithin the realm of content-based restrictions," viewpoint restrictions are subject to "the most exacting scrutiny." *Id.* at 9. The Plaintiffs contend that "[d]ue to the particularly egregious nature of viewpoint discrimination," the Supreme Court has prohibited government restrictions on viewpoint regardless of the forum in which the speech is prohibited and the strength of the government's interest in restricting speech. *Id.* at 9–10.

Turning specifically to government interaction with artistic expression, the Plaintiffs argue that "content-based restrictions are permissible so long as they are not viewpoint based." *Id.* at 10 (citing *Nat'l Endowment for the Arts v. Finley,* 524 U.S. 569, 572–73, 118 S.Ct. 2168, 141 L.Ed.2d 500 (1998)). They maintain that the Defendants' removal of the Mural was "not only content-based but viewpoint-based." *Id.* at 11. They allege that the Defendants removed the mural "in response to complaints from an anonymous individual who said the mural was propaganda of the Union movement and reminded [them] of murals from communist North Korea used to brainwash the masses,' as well as complaints from several unnamed members of the business community." *Id.* The Plaintiffs argue that this justification evinces the Defendants' disagreement with the murals "pro-Union" and "anti-business" views, and that there were "[n]o viewpoint-neutral reasons" to remove the mural from its location in the MDOL lobby. *Id.*

Anticipating the Defendants' response, the Plaintiffs argue that the mural is not "government speech." *Id.* They recognize that the Supreme Court in *Pleasant Grove City, Utah v. Summum,* 555 U.S. 460, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009), held that donated monuments for permanent display in a public park constitute "government speech" not subject to the Free Speech Clause. *Id.* But in their memoranda, the Plaintiffs distinguish *Pleasant Grove* on two grounds. First they argue that the artist, Judy Taylor, retained rights in the mural by way of her contract with the State, thereby retaining a First Amendment interest in the mural and conferring a "private speech" aspect to the expressive work. *Id.* at 12. Second, they argue that "even where expressive works are owned by the government and the government has broad discretion to grant or deny access to that speech, the government nevertheless may not exercise its discretion to suppress speech based purely on narrow partisan political grounds." *Id.* at 12–13.

At oral argument, the Plaintiffs emphasized a third distinction: the "unmistakably understood" factor in *Pleasant Grove.* In *Pleasant Grove,* the Supreme Court wrote that "[t]he City's actions provided a more dramatic form of adoption than the sort of formal endorsement that respondent would demand, unmistakably signifying to all Park visitors that the City intends the monument to speak on its behalf." 129 S.Ct. at 1134. Seeking a ***176** standard to measure what a work of art would unmistakably signify, the Plaintiffs turn to Justice Souter's concurrence in *Pleasant Grove* and note that he proposed that "the best approach" would be to ask "whether a reasonable and fully informed observer would understand the expression to be government speech." *Id.* at 1142. Applying these dual standards to the mural, the Plaintiffs argued that a "reasonable and fully informed observer" would not understand that the mural unmistakably signified government speech.

In addition to their success on the merits, the Plaintiffs argue that they have met the other prerequisites for a TRO. They contend that they will suffer irreparable harm unless the Defendants are enjoined since courts have

held that First Amendment violations are irreparable injuries, not adequately compensable by money damages. *Id.* at 16–17. They argue that they have been deprived of an opportunity to "draw ideas and inspiration from the [m]ural," and that this "cannot be compensated through money damages." *Id.* at 17–18. Moreover, they are concerned that the mural is currently being stored in inappropriate conditions, potentially subjecting it to damage that may permanently deprive them of the "opportunity to view the [m]ural in its original state, if at all." *Id.* at 18. In contrast to their irreparable harm, the Plaintiffs assert that the Defendants "will not suffer any hardship by complying with the requirements of the First Amendment," and that restoration of the mural "will merely restore the *status quo ante.*" *Id.* at 19. Finally, the Plaintiffs contend that the public interest favors granting a TRO. *Id.* They assert that restoration of the mural would "serve the broad public interest in protecting the First Amendment right to receive information and ideas.' " *Id.* (quoting *Pico,* 457 U.S. at 867, 102 S.Ct. 2799). Moreover, they argue that restoration of the mural would serve the policy of Maine to "preserve and exhibit the environmental and cultural richness of the State," to "further the cultural and educational interests of the people of the State," and to present Maine's "proud heritage and unique historical background." *Id.* at 19–20 (quoting 27 M.R.S. § 81).

2. The Defendants' Response

The Defendants first respond that the Plaintiffs lack standing to bring this case. *Def's' Resp.* at 3. Noting that the "traditional role of Anglo–American courts" is "to redress or prevent actual or imminently threatened injury caused by private or official violation of law," the Defendants say that this Court has "no charter to review and revise legislative and executive action." *Id.* (quoting *Arizona Christian Sch. Tuition Org. v. Winn,* ––––U.S. ––––, 131 S.Ct. 1436, 179 L.Ed.2d 523 (2011)). To demonstrate standing, the Defendants say, the Plaintiffs must show "injury in fact," "a causal connection between the injury and the conduct complained of," and a conclusion that it is "likely' as opposed to merely speculative,' that the injury will be redressed by a favorable decision.' " *Id.* (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). Observing that the Plaintiffs claim nothing more than that "they are citizens of Maine who have viewed the mural in the past and intend to view the mural again," the Defendants say that this is precisely the type of standing the Supreme Court rejected in *Lujan. Id.* at 4. The Defendants conclude that "[a]s members of the general public, [the Plaintiffs] have no standing to inspect the government-owned mural under the First Amendment." *Id.*

The Defendants next respond that the First Amendment does not apply to the Mural because it is government speech. ***177** *Defs.' Resp.* at 5. They assert that both the previous administration's commissioning and the current administration's removal of the mural were government speech. *Id.* They contend the sole difference between the commissioning and the removal is the Plaintiffs' personal approval of the former and disapproval of the latter. *Id.* They say that to subject such speech to the First Amendment would make a prior administration's speech "fixed and unalterable," a proposition they argue is "clearly at odds with both common sense and Supreme Court precedent." *Id.* at 6. They argue that all the cases cited by Plaintiffs for the proposition that the government cannot speak as it wishes through the exhibition or non-exhibition of art were handed down before *Pleasant Grove. Id.* at 7. The Defendants further disagree that the artist retained a sufficient legal interest in the mural to deem it private speech subject to the First Amendment; instead, they say that the artist "relinquished any First Amendment right she may have had upon sale." *Id.* (citing *Serra v. United States General Servs. Administration,* 847 F.2d 1045, 1049 (2d Cir.1988)). They further argue that "[t]here is no authority for the proposition that the First Amendment demands that these Plaintiffs be informed of the mural's whereabouts or be allowed to inspect it." *Id.* at 8.

Turning to the other prerequisites for a TRO, the Defendants argue that the Plaintiffs will not be irreparably harmed if a TRO is not granted. *Id.* at 8. They reiterate their view that the Plaintiffs have no interest in the mural and assert that "[i]n any event, [the Plaintiffs'] inability to look at the mural until the litigation is resolved or the mural is placed at a different location is at most a temporary inconvenience and certainly cannot be viewed as irreparable harm.' " *Id.* Moreover, they contend that the Plaintiffs' allegations that the mural has been damaged or is being improperly stored are "conjecture." *Id.* They argue that the harm to the state "would be to have a federal court issue a mandatory order against

them, and in doing so decide political issues by directing government speech in violation of the Constitution." *Id.* at 9. Finally, they argue that the public interest weighs against issuing a TRO because this is a political issue and "[t]he Constitution mandates that it be resolved in the political arena, not the judicial one." *Id.*

C. The Plaintiffs' Reply

The Plaintiffs insist they have standing to assert a violation of their First Amendment rights. *Pls.' Reply* at 1. They reiterate their "right to receive information and ideas,' " *id.* (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 756–57, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976)), and that the removal of the mural violates that right, causing the Plaintiffs "concrete and particularized harm." *Id.* at 1–2. They distinguish themselves from the plaintiffs in *Lujan* by noting that Plaintiffs Berry and Newton regularly visit the MDOL for business reasons, so their exposure to the alleged harm is definite and regular. *Id.* at 2.

The Plaintiffs reiterate that the state's removal of the mural violated their First Amendment rights for three reasons. First, they say the removal was motivated by the Defendants' "disagreement with the [m]ural's perceived political viewpoint." *Id.* at 3. They contend that viewpoint-based restrictions of speech are unconstitutional regardless of the forum in which the restriction takes place. *Id.* at 3, 9–10. Second, they argue that even if the mural is government speech, it was unconstitutional to suppress the mural's message based solely on disagreement with its perceived political viewpoint. *Id.* at 3, 10–11. ***178** Finally, they reassert that the mural is private speech and that the MDOL is a government-owned forum for public discourse. *Id.* at 3, 5–9, 11–14. They contend that government restriction of private speech in such a forum is subject to strict scrutiny and that the Defendants' actions cannot withstand strict scrutiny because the removal of the mural is not narrowly tailored to serve any compelling state interest. *Id.* at 3, 11–14.

D. The Defendants' Sur–Reply

In their sur-reply, the Defendants dispute the Plaintiffs' assertion that they have a right to receive ideas and information expressed by artwork owned by the government. *Defs' Sur-reply* at 1. They contend that the case the Plaintiffs cite to support the existence of such a right involved government restrictions on private speakers and the right to receive information from those private speakers presupposed their willingness to speak. *Id.* at 2 (*Virginia State Bd. of Pharmacy,* 425 U.S. at 757, 96 S.Ct. 1817). They argue that the Plaintiffs cannot force an unwilling speaker to speak. *Id.* They assert that because there is no such right, there was no injury violating the right and thus the Plaintiffs lack standing. *Id.* at 1–2. The Defendants further contend that the Plaintiffs' argument for standing invokes the artist's speech rights. *Id.* They observe that she is not a plaintiff and as such the Plaintiffs have no standing to make claims on her behalf. *Id.* at 2–3.

Next, the Defendants reiterate that the removal of the mural was government speech. *Id.* at 3, 6–9. They emphasize the government's ownership and control of the mural, from inception to removal, and the government's placement of the mural in the MDOL lobby to support their view that the mural represents the government's own expression. *Id.* at 6–7. They say that because it was government speech, the Defendants' actions did not have to be viewpoint neutral. *Id.* at 5. They argue that the Plaintiffs' arguments to the contrary rely on distinguishable or overruled case law. *Id.* at 5–6. The Defendants further contend that the artist did not maintain sufficient contractual rights in the mural for it to be considered her private speech. *Id.* at 9. Assuming forum analysis were to apply, they assert that the MDOL is not a public forum and did not become one by the government's solicitations for and displaying of a single piece of artwork. *Id.* at 11–12. Finally, they contend that the Plaintiffs' arguments are "self-defeating" because "it would *not* be viewpoint-neutral for the State to exhibit forever one artistic perspective on labor." *Id.* at 13–14 (emphasis in original).

II. DISCUSSION

A. Legal Standard for TRO

[1] To determine whether to issue a temporary restraining order, the Court applies the same four-factor analysis used to evaluate a motion for preliminary injunction. *Northwest Bypass Group v. United States Army Corps of Eng'rs,* 453 F.Supp.2d 333, 337 (D.N.H.2006). The movant must demonstrate:

(1) it will likely succeed on the merits;

(2) it will suffer irreparable harm if the injunction is denied;

(3) the harm it will suffer outweighs any harm to [the defendant] that would be caused by injunctive relief; and,

(4) the effect on the public interest weighs in its favor.

Esso Standard Oil Co. v. Monroig–Zayas, 445 F.3d 13, 18 (1st Cir.2006); *Kelly Servs., Inc. v. Greene,* 535 F.Supp.2d 180, 183 (D.Me.2008). A preliminary injunction is "an extraordinary and drastic remedy, one that should not be granted unless the ***179** movant, *by a clear showing,* carries the burden of persuasion." *Mazurek v. Armstrong,* 520 U.S. 968, 973, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997) (quoting 11A C. Wright, A. Miller & M. Kane, FEDERAL PRACTICE AND PROCEDURE § 2948, pp. 129–30 (2d ed. 1995) (emphasis added in opinion)). To support or oppose a motion for injunctive relief, "the parties must present [e]vidence that goes beyond the unverified allegations of the pleadings....' " *Kelly Servs.,* 535 F.Supp.2d at 181, n. 1 (quoting 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE § 2949 (2d ed. 1995)). Here, the parties presented affidavits in support of their respective positions.

B. Standing

In *Griswold v. Driscoll,* the First Circuit addressed a claim that a decision by the Commissioner of Elementary and Secondary Education of Massachusetts to revise an advisory "curriculum guide" in response to political pressure violated the First Amendment. 616 F.3d 53 (1st Cir.2010). In defense, the Commissioner questioned whether the Plaintiffs had standing to raise the First Amendment claim. *Id.* at 56. The *Griswold* Court observed "the dispositive questions of standing and statement of a cognizable claim are difficult to disentangle." *Id.* As the *Griswold* Court described it, if the plaintiffs in *Griswold* stated a First Amendment claim supported by the evidence about the curriculum guide, the "opportunity for a distinct analysis of standing is clear." *Id.* At the same time, an "equally straightforward reading is that of a curriculum guide claim that should be treated like one about a library, in which case pleading cognizable injury and stating a cognizable claim resist distinction." *Id.* The First Circuit resolved to "dispose of both standing and merits issues together." *Id.*

That is also the case here. Whether the Plaintiffs are suffering a cognizable injury is entangled with whether they have a First Amendment right to view the mural. Thus, it makes good sense to follow the First Circuit's lead and treat standing and the merits as intertwined. An exception may be the Plaintiffs' standing to assert the continuing contractual rights of the artist, who is not a party to the case, a proposition about which the Court has a healthy degree of skepticism. But as the resolution is the same, the Court will not reach the standing question of whether the Plaintiffs are asserting or could assert First Amendment claims that rely on a third person's contractual rights.

C. Likelihood of Success

[2] The "sine qua non of this four-part inquiry is likelihood of success on the merits: if the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity." *Bl(a)ck Tea Soc'y v. City of Boston,* 378 F.3d 8, 15 (1st Cir.2004) (citation omitted).

1. The First Amendment

In their motion, the Plaintiffs reiterate seminal principles of free speech that strike at the core of the Bill of Rights and constitutional liberty about which there is no controversy. The Court agrees with the Plaintiffs' general contentions that the First Amendment extends its protection to works of art like the mural, and that the First Amendment includes the right to speak and the right to listen to a willing speaker—for visual works of art, the right to create and the right to view a willing exhibitor's work. If this were an action to prevent the state of Maine from entering onto a private museum, for example, and attempting to censor the works of art on the wall, the answer to this motion would ***180** be obvious. No government in this Country can constitutionally do such a thing.

2. The Government Speech Doctrine

[3] This case is not, however, about state regulation of private speech; it is about whether the government itself has a right to speak for itself or in the case of the

removal of the mural, the right not to speak: the so-called government speech doctrine.[2] The United States Supreme Court has stated in unmistakable language that government speech is different than private speech; in the words of the Supreme Court, "[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove,* 555 U.S. 460, 129 S.Ct. at 1129. The government speech doctrine is neither aberrational nor novel. In a Court that periodically disagrees with itself on critical issues, the Supreme Court decided *Pleasant Grove* 9–0 with several concurrences. *Id.* The *Pleasant Grove* Court cites a number of cases where the doctrine had been mentioned. *Id.* at 1131 (citing *Johanns v. Livestock Marketing Assn.,* 544 U.S. 550, 553, 125 S.Ct. 2055, 161 L.Ed.2d 896 (2005)) ("[T]he Government's own speech ... is exempt from First Amendment scrutiny"); *Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94, 139, n. 7, 93 S.Ct. 2080, 36 L.Ed.2d 772 (Stewart, J., concurring) ("Government is not restrained by the First Amendment from controlling its own expression"); *Bd. of Regents of Univ. of Wis. Sys. v. Southworth,* 529 U.S. 217, 229, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000) (stating that a government entity has the right to "speak for itself"); *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) ("[I]t is entitled to say what it wishes" and to select the views that it wants to express); *Nat'l Endowment for Arts v. Finley,* 524 U.S. 569, 598, 118 S.Ct. 2168, 141 L.Ed.2d 500 (1998) (Scalia, J., concurring in judgment) ("It is the very business of government to favor and disfavor points of view").

2 The Court rejects the Plaintiffs' creative contention that the mural represents private speech for reasons it explains later in the opinion.

With this said, in 2009, the *Pleasant Grove* Court expanded the contours of the doctrine, and by Supreme Court standards, the doctrine is, as Justice Souter recently wrote, "still at an adolescent stage of imprecision." *Griswold v. Driscoll,* 616 F.3d 53, 59 n. 6 (1st Cir.2010); *Pleasant Grove,* 129 S.Ct. at 1139, 129 S.Ct. 1125 (Stevens, J. concurring) (describing it as "recently minted").

a. *Pleasant Grove*

In *Pleasant Grove,* the United States Supreme Court considered whether a municipality violated the First Amendment when it prohibited a private group from placing a permanent monument in a city park where other donated monuments had been erected. 129 S.Ct. at 1129. The private group, a religious organization called Summum, requested permission to erect a stone monument containing "the Seven Aphorisms of SUMMUM" in a Pleasant Grove, Utah public park. *Id.* at 1130. The city denied its request. *Id.* Pleasant Grove had previously accepted a monument of the Ten Commandments in the same park, and Summum alleged that the city "violated the Free Speech Clause of the First Amendment by accepting the Ten Commandments monument but rejecting the proposed Seven Aphorisms monument." *Id.*

Observing that the parties fundamentally disagreed about whether the city was engaging in its own expressive conduct or was providing a forum for private speech, the Supreme Court concluded that "the ***181** placement of a permanent monument in a public park is best viewed as a form of government speech not subject to scrutiny under the Free Speech Clause." *Id.* at 1129. It articulated the principle that "[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Id.* at 1131. The Court examined the policies underlying this principle. *Id.* It explained that the government would be unable to function if "every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed." *Id.* If that were the case, political debate would be relegated to the private sector. *Id.*

The *Pleasant Grove* Court did not set forth a specific analysis to determine whether expression is government or private speech, but it hinted at certain relevant factors. First, it observed that "[n]either the Court of Appeals nor respondent disputes the obvious proposition that a monument that is commissioned and financed by a government body for placement on public land constitutes government speech." *Id.* at 1133. The Court also added the concept of permanency. ("Permanent monuments displayed on public property typically represent government speech"). Second, it noted that government speech does not become private speech merely because it "receives assistance from private sources for the purpose of delivering a government-related message." *Id.* Third, it suggested that the government's involvement in commissioning the work and in how it came to be in public space matters. Explaining why monuments on

public property are typically public speech, the Court stated that "[w]hen a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure." *Id.* at 1133. Fourth, the Supreme Court indicated that the location of the work is important because it is "not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated." *Id.* Fifth, a government's ability to reject works is a hallmark of government speech. *Id.* ("Respondent does not claim that the City ever opened up the Park for the placement of whatever permanent monuments might be offered by private donors. Rather, the City has effectively controlled' the messages sent by the monument in the Park by exercising final approval authority' over their selection"). *Id.* at 1134. Finally, the size of the venue where the work is displayed is a relevant consideration. *Id.* at 1137 ("public parks can accommodate only a limited number of permanent monuments ....it is hard to imagine how a public park could be opened up for the installation of permanent monuments by every person or group wishing to engage in that form or expression"). Taken together, these considerations suggest that the government's control over speech is the predominant consideration in the government speech analysis. *See also* *Sutliffe v. Epping,* 584 F.3d 314, 329 (1st Cir.2009) ("plaintiffs' claim fails because the Town defendants' actions, in setting up and controlling a town website and choosing not to allow the hyperlinks constituted government speech.") Applying these factors to the facts in this case, the Court concludes that the mural fits well within the conception of government speech in *Pleasant Grove.*

i. Permanent Publicly–Financed Monuments on Public Property

[4] The *Pleasant Grove* Court presented a general framework for identifying government speech. In *Pleasant Grove,* the Supreme Court was addressing the ***182** proposed placement of a stone monument in a city park and it remarked that it was obviously government speech because it was a 1) permanent, 2) publicly-financed 3) monument, 4) displayed on 5) public property. *Id.* at 1130–31. Here, the Percent for Art contract specified that the "permanent location of the work shall be: Department of Labor, Augusta, Maine." *First Am. Compl.* Attach. 1 at 12–13 (*Percent for Art Contract*). Accordingly, the artist, the MDOL, and the Plaintiffs all contend that the mural was intended to be permanent, satisfying one *Pleasant Grove* factor. The parties also agreed that the mural here was publicly-financed, satisfying the second factor. There is no controversy about whether the mural had been displayed in the anteroom [3] of the MDOL and therefore the mural meets the fourth and fifth factors. The mural was displayed in the anteroom of the MDOL, which is public property, but not the kind of open forum of a public park.

3 Each party sought to gain some definitional advantage in the term used to describe the room in which the mural was located. The Plaintiffs describe the room as a "lobby;" the Defendants as a "waiting room." The Court has never visited the MDOL office and has no photographs depicting it; it relies on a description of the room contained in an affidavit submitted by a state employee. The affidavit says that the MDOL leases a portion of an office building "several miles from the State Capitol in a building that is privately owned." *Def.'s Sur-reply* Attach. 1 *Aff. of Adam Fisher* ¶ 4. The office building contains both private and public tenants. *Id.* The anteroom is "approximately 125 feet down a corridor from the nearest public entrance" and the corridor is used by those "transacting business with the Department, other state agencies and private entities renting office space." *Id.* ¶ 5. The room is "approximately 12 feet by 26 feet in size." *Id.* ¶ 9. At one end of the room is a "receptionist behind a security window." *Id.* ¶ 11. Three sides of the room are "lined with nine chairs, and two small tables." *Id.* ¶ 10. During oral argument, the Court questioned Plaintiffs' counsel about this description and they agreed that it was generally accurate.

In light of the details of the description, the Court views "waiting room" as more accurate than "lobby" since the latter term conveys an image of a hotel lobby, a large semi-public reception area connecting the public exterior to the more private interior of a hotel. Nevertheless, rather than quibble about terms, the Court uses the more neutral word, "anteroom", to describe the room where the mural was located.

A final factor is that the work of art in *Pleasant Grove* was a monument; here, the work of art is a mural. The question for this factor becomes whether a mural is like a monument for government speech purposes. The *Pleasant*

Grove Court's description of a monument in relation to the concept of government speech is illuminating:

> A monument, by definition, is a structure that is designed as a means of expression. When a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure.

129 S.Ct. at 1133. What is significant for government speech is not that the work in *Pleasant Grove* was a monument, but that as a monument, the work of art was "designed as a means of expression" and the government "wishe[d] to convey some thought or instill some feeling in those who see the [work]." The mural here clearly met this criterion.

Moreover, the Complaint asserts that the mural is thirty-six feet, consists of eleven panels, and was designed "specifically to fit into the space in the lobby of the MDOL offices in Augusta." *First Am. Compl.* at ¶¶ 26–27. Visitors to the MDOL would not see the mural as one of many pieces of art in the anteroom. Its size and design characteristics indicate that the mural was intended as a permanent piece of the décor in the MDOL ***183** anteroom. There is no indication that it was a mobile piece of artwork created to travel from location to location like the works of art in the cases cited by the Plaintiffs. *Pleasant Grove* distinguished permanent monuments from temporary displays of private works. *See Pleasant Grove,* 129 S.Ct. at 1138, 129 S.Ct. 1125 (distinguishing *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) in which a group requested to display "a cross for a period of 16 days on public property that had been opened up for similar temporary displays"). The mural was in the MDOL anteroom for three years, and if the Plaintiffs were successful, it would be there permanently. Like a monument in a public park, it seems the mural was contemplated as more of a fixture in the MDOL anteroom than as a temporary display of a private work.

The conclusion is that the mural in this case fits easily within the general factor analysis in *Pleasant Grove* and is likely government speech. This overview analysis does not end the discussion because the *Pleasant Grove* Court also examined other more specific criteria, which test more thoroughly each of these general factors.

ii. The Source of the Speech: The Creator and the Funding

The source of the mural was the creative ability of a private, not government artist. In this Court's view, this does not mean the mural must be private speech. Just as a monument in a park does not remain private speech because it was carved by a private sculptor, the mural here does not remain private speech because it was painted by a private artist. To rule otherwise would severely constrain the reach of the doctrine only to government artists. Here, the funding for the commission and purchase of the mural was solely governmental, so the question of private funding of a government-related message is not present.

iii. Governmental Involvement in the Work

It was in 2007 that the Maine Arts Commission (MAC) and the MDOL, both state agencies, issued a request for proposals from the public for a Public Arts project to be placed in the MDOL office in Augusta. *First Am. Compl.* ¶ 23. After Judy Taylor's proposal was accepted, she entered into a contract with the MDOL in which she agreed to create and install a work of art entitled Maine Labor Mural Cycle with specified dimensions made of specific materials consisting of ten panels depicting "selected episodes in the history of Maine labor." *Percent for Art Contract* at 12. Upon final acceptance of the work, "[o]fficial sole ownership" transferred when the MDOL sent Ms. Taylor a letter of final acceptance, which triggered final payment. *Id.* at 13. The MDOL agreed to provide and install an identification plaque, which contained the following information:

> Title of Artwork: The Maine Labor Mural Cycle
>
> Year: 2007–2008
>
> Artist: Judy Taylor
>
> Commissioned for The Department of Labor and the citizens of Maine under the Maine Percent for Art Act administered by the Maine Arts Commission

Id. at 14. Ms. Taylor retained the right to copyright the work but the DOL retained the right to reproduce it

for the benefit of the public, and the artist agreed to "give a credit" to the MDOL in any public showing of reproductions of the work by noting: "Originally owned by The Department of Labor and the State of Maine." *Id.* at 15. The MDOL agreed not to "intentionally destroy or alter the work in any way whatsoever without prior consultation with the [MAC] and the artist." *Id.* The MDOL ***184** agreed to place the mural "in the location for which it was selected." *Id.* The contract further provided that "if, for any reason, the work has to be removed or moved to a new location," Ms. Taylor and the MAC had the right to advise or consult with MDOL "regarding the treatment of the work." *Id.*

Here, the Court concludes that the state of Maine's involvement in this mural was and continues to be substantial. The state originated the idea for the mural; it commissioned the work; it chose the subject of the mural; it selected its original location; it chose the artist; it paid for it; it owns it; it retains the right to move it or even destroy it.

iv. The Location of the Work and the Message

Until recently, the mural was located in an anteroom in the MDOL. The state chose the location of the work and the state awarded the commission to Ms. Taylor to depict the history of the Maine labor movement, a theme consistent with the mission of the MDOL. If the state had commissioned a work of art that depicted the beauty of the Maine coast, a visitor might well conclude that the message was personal to the artist. Here, however, because the mission of the MDOL coincided with the theme of the state-commissioned mural, the visitor is more likely to view the mural as an expression of a government point of view about organized labor.

v. Government Exclusion

The Percent for Art contract alludes to a DOL solicitation for proposals for the artwork; however, the parties did not provide the Court with the solicitation itself, which could help answer the extent to which the state narrowed the topic of the artwork to the history of labor.[4] It is not clear, therefore, that the state excluded other themes. What is clear, however, is that "through an advisory selection committee," the MDOL "solicited proposals" and it was the MDOL that awarded Ms. Taylor the commission based on her proposal to depict the history of the labor movement in the state of Maine. *Percent for Art Contract* at 12. The artist promised to "create the work in accordance with the approved design" and was allowed to make only "minor changes in the final work as is deemed aesthetically or structurally necessary." *Id.* The Percent for Art Contract confirms that the MDOL controlled the process by which the artist and the theme were selected.

4 If the state considered only solicitations that proposed works of art that depicted the history of the labor movement in Maine, this factor would be some evidence that the Government used the solicitation process to express its viewpoint through the work of art. At the same time if the Government solicitation was more general, this would suggest it had not excluded viewpoints other than the mural. But the parties did not place the solicitation in evidence so the Court can draw no conclusions on this question.

vi. The Venue

There are a couple of aspects to the venue question. The first is *Pleasant Grove's* emphasis on the proposed location of the Summum Church monument as a public park; the second is the size of the monument in relation to the available space.

Regarding public parks, the *Pleasant Grove* Court observed that "[p]ublic parks are often identified in the public mind with the government unit that owns the land." *Pleasant Grove,* 129 S.Ct. at 1133, 129 S.Ct. 1125. The Supreme Court noted:

> Government decisionmakers select the monuments that portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture. The monuments that are accepted, therefore, are meant to convey ***185** and have the effect of conveying a government message, and they thus constitute government speech.

Id. at 1134. But at the same time, the Supreme Court rejected the traditional "forum analysis" for this type of

case. *Id.* (stating that "it is obvious that forum analysis is out of place"). Unlike most speech in a public park, such as a political rally, a march, or an address, monuments are permanent fixed expressions of particular ideas, and they "monopolize the use of the land on which they stand and interfere permanently with other uses of public space." *Id.* at 1337. As government space is necessarily limited, if the government were required to treat permanent monuments the way it treats a protest march, government officials would have to "brace themselves for an influx of clutter." *Id.* at 1338 (quoting 499 F.3d at 1175) (McConnell, J., dissenting from the denial of rehearing en banc).

Thus, the forum analysis does not apply to the mural in the anteroom at MDOL. But the *Pleasant Grove* Court's concern about the size of the monument in relation to the size of the public space does. Here, the question becomes whether the mural as a particular view of the history of the labor movement in Maine effectively crowds out the possible presentation of other views. The Defendants say that the MDOL anteroom is "approximately 12 feet by 26 feet in size." *Def.'s Surreply* Attach. 1 *Aff. of Adam Fisher* ¶ 9. They describe the room as having "a receptionist behind a security window" on one end. *Id.* ¶ 11. The three other sides of the room "are lined with nine chairs, and two small tables. The mural was on two of these sides." *Id.* ¶ 12. The Percent for Art contract stipulates the dimensions of the mural: One wall: 12# 3/8# x 6# 3/4# Second wall: 12# 3/8# x 24#. *Percent for Art Contract* at 12. Fitting the dimensions of the mural into the dimensions of the anteroom, the mural must have covered virtually the entire length of one side of the room—24# within a 26# long wall—and more than half the width of another wall—6#3/4# within a 12# wide wall. Although the height of the room is not revealed, unless the height was extremely unusual, the mural, which is uniformly 12# 3/8# tall, must have covered the walls from floor to ceiling. Based on the limited record, the Court cannot exclude the possibility that the government could present another viewpoint within the limited available unadorned wall space in the anteroom if the mural were to remain there. However, the Court does conclude that the viewpoint of the mural would in any case dominate the available public space within the anteroom and "monopolize the use of the [room in] which [it hangs] and interfere permanently with other uses of public space." *Id.* at 1337.

The parties have not presented a depiction of the mural as it looked in the anteroom before its removal. However, they have presented enough facts to convey a sense of the scale of the mural in relation to the dimensions of the room. Accordingly, like a public park, the MDOL anteroom did not have the capacity to accommodate works expressing every viewpoint. Taking these facts together, it appears that the State conceived of and selected the mural for display on publicly-controlled property as a means of expressing its own message.

b. Summary: The *Pleasant Grove* Factors

Applying the general and more specific factors in *Pleasant Grove*to the facts in this case, the Court readily concludes that the mural in the MDOL anteroom fits within the concept of government speech.

3. The Plaintiffs' Specific Contentions

The Plaintiffs have raised certain contentions that they say distinguish this case ***186** from the *Pleasant Grove* analysis and requires a different result.

a. Monuments and Murals

The Plaintiffs argue that paintings in public spaces should not be subject to the same analysis as the monuments in public parks. They assert that monuments have a "long history ... on public land as expressions of government speech." *Pls.' Reply* at 6. They contend that the history of display of artwork in public places is quite different. *Id.* at 7. Specifically, they argue that "there is an equally long tradition of governments opening up publicly owned spaces for exhibition of art by *private* speakers." *Id.* (emphasis in original). As such, they maintain that visitors to the MDOL would reasonably identify the mural as the expression of a private citizen.

In support, they cite case law where courts concluded that by opening up public space for the display of individual artistic works, the government does not intend to adopt the message of the artists or communicate a government message. *Pls.' Reply* at 7 (citing *Hopper v. Pasco,* 241 F.3d 1067 (9th Cir.2001); *Henderson v. Murfreesboro,* 960 F.Supp. 1292 (M.D.Tenn.1997); *Sefick v. Chicago,* 485 F.Supp. 644 (N.D.Ill.1979)). This Court has no quarrel with any of these cases but they are easily

distinguishable: they all involve work not paid for by the government, owned by the artist, and on temporary display in government space. Thus, they are much more like a public protest in a public park than the mural in this case. In *Hopper,* in a program administered by a private organization, the city invited local artists to display their works for three months in the public hallways of the city hall in hopes that passersby would purchase the works from the artists. *Hopper,* 241 F.3d at 1070–72. In *Henderson,* the Court addressed a complaint about a painting of a partially nude woman exhibited by the artist in the rotunda of the state capitol building. [5] 960 F.Supp. at 1294–95. In *Sefick,* the artist was scheduled to present sculpted figures in tableau for a period of three weeks, and one of his tableaus satirized the current mayor; hardly a situation where the viewer might conclude the work represented government speech. *Sefick,* 485 F.Supp. at 646–48. In these cases, there is no suggestion that anyone could have reasonably confused the controversial works of art with government speech. Moreover, even if courts have held that certain private paintings displayed on government land were not government speech, it does not follow that no painting displayed on government land can be government speech.

5 The *Henderson* Court does not directly describe how long the artwork was to be displayed but based on the Court's description of the exhibition program, this Court infers that the individual works of art were not on permanent display.

Moreover, the Plaintiffs make too much of the differences in media. Courts have found that government speech exists in myriad forms. *Sutliffe v. Epping School District,* 584 F.3d at 329 (Town's choice of hyperlinks on town website found to be government speech); *Illinois Dunesland Preservation Society v. Illinois Department of Natural Resources,* 584 F.3d 719, 724–25 (Informational pamphlets on government-owned rack in public park found to be government speech); *Johanns v. Livestock Marketing Ass'n,* 544 U.S. 550, 562, 125 S.Ct. 2055, 161 L.Ed.2d 896 (2005) (selection of language for joint public-private advertisement of beef products found to be government speech). What matters is not the medium used but the communicative characteristics of the speech. The Court finds that the mural played a similar communicative role as that attributed to monuments in *Pleasant Grove. See supra* ***187** Section II.C.1.a.i (explaining that the mural meets the criteria of a monument as defined in *Pleasant Grove*).

b. The Artist's Contractual Rights and Government Speech

Plaintiffs argue that the mural is private speech because the artist maintained contractual rights in it. For this argument, the Plaintiffs rely principally on *Serra v. United States General Services Administration,* 847 F.2d 1045, 1049 (2nd Cir.1988). In *Serra,* the General Services Administration (GSA) had approved the removal of “Tilted Arch”, an outdoor sculpture in Federal Plaza in New York City, after the work had become the subject of “intense public criticism” about “the sculpture's appearance and its obstruction of Federal Plaza's previously open space.” *Id.* at 1047. The artist sued GSA on multiple grounds, including a First Amendment claim. The *Serra* Court observed among other things that “Serra relinquished his own speech rights in the sculpture when he voluntarily sold it to GSA; if he wished to retain some degree of control as to the duration and location of the display of his work, he had the opportunity to bargain for such rights in making the contract for sale of his work.” *Id.* at 1049. Pointing to provisions in the Percent for Art contract, the Plaintiffs claim that Ms. Taylor retained sufficient control over her mural to allow them to maintain a First Amendment claim against the Defendants here.

Preliminarily, the Court is not at all clear that the Plaintiffs, who are not the artist, have standing to assert the artist's contractual rights in this case. However, even if they do, their argument fails. The Second Circuit decided *Serra* in 1988, over two decades before the Supreme Court decided *Pleasant Grove,* and the *Serra* Court, relying on *Board of Education v. Pico,* 457 U.S. 853, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982), observed that “there are conceivably situations in which the Government's exercise of its discretion ... could violate the First Amendment rights of the public.” *Id.* at 1049. In its clear conclusion that the “Free Speech Clause restricts government regulation of private speech” and does not “regulate government speech”, the Supreme Court casts doubt on the continued viability of *Serra's* premise that the Free Speech Clause of the First Amendment could apply to government speech.

But the Plaintiffs' point is different. It is that Ms. Taylor's continuing contractual rights in the mural make the

mural not government speech at all; in effect, placing the mural under *Serra's* comment that if the artist had wanted to be able to assert First Amendment rights in his sculpture, he should have bargained for them. Here, however, assuming *Serra* is correct on this point, the facts do not support the Plaintiffs' contention that Ms. Taylor retained a set of property rights in the mural that would preclude the application of the government speech doctrine. The Plaintiffs point to the fact that in the Percent for Art contract, the state agreed to identify her as the artist, to give her advance notice and consultation before the destruction, alteration, removal or relocation of the mural, and to allow her to retain the copyright for the mural. *Pls.' Resp.* at 8–9. The Plaintiffs further note that the contract expressly provided that in creating this work, Ms. Taylor was an independent contractor, not a state employee, and that other than generally describing the theme for the work, the state did not control its content. [6] *Id.*

6 It is possible that the terms of a contract could significantly alter the analysis. For example, assume that the MDOL and Ms. Taylor had contractually agreed that the mural would be displayed with the following caveat prominently displayed:

> The contents of this mural represent the views and opinions solely of Judy Taylor, the artist, and do not represent the views and opinions of the MDOL or the state of Maine.

Whether in the context of this case, this type of disclaimer would have been sufficient to alert the viewer that MDOL was not claiming ownership of the speech remains to be seen, but no such disclaimer has been made in this case.

***188** From the Court's viewpoint, the slight contractual strings that Ms. Taylor held on the mural after its sale do not remove the mural from the application of the government speech doctrine. Here, as earlier noted, the state originated the idea of the work, dictated its theme, commissioned its creation, paid for it, owns it, displays it on its property, and has the right even to destroy it. The artist's ongoing legal rights, such as they are, are for the most part for prior consultation, not veto power. Thus, if the MDOL decided to burn the mural, it would only have to consult with Ms. Taylor before doing so, and if she protested and protested vehemently, it would not matter contractually. Even accepting the Plaintiffs' premise that some contractual retention of ownership rights would amount to a matter of constitutional and not contractual law, the minimal rights Ms. Taylor retained in this mural (and has not asserted here) do not foreclose the application of the government speech doctrine.

More to the point, even if Ms. Taylor had continued to own the mural, it may not make a difference. In *American Atheists, Inc. v. Davenport,* a post-*Pleasant Grove* decision, the Tenth Circuit suggested that ownership does not alter the government speech analysis. 637 F.3d 1095, 1114–15 (10th Cir.2010). They noted that the Supreme Court stated in *Pleasant Grove* that the city had "taken ownership of most of the monuments in the Park.' " *Id.* (quoting *Pleasant Grove,* 129 S.Ct. at 1134, 129 S.Ct. 1125.). According to the Tenth Circuit, the Court's use of the word "most" left open the possibility that there were other monuments in the park not owned by the City. *Id.* The Tenth Circuit stated that the Supreme Court "strongly implied" that even those monuments not owned by the City were government speech. *Id.* Concluding that ownership did not alter the government speech analysis, the *American Atheists* Court held that crosses placed on state land by a private organization were government speech even though the private organization maintained full ownership of the crosses. *Id.* at 11–14.

c. "Unmistakably Signifying"

At the TRO hearing, the Plaintiffs raised another point, seeking to take this mural outside the scope of the government speech doctrine. They argued that *Pleasant Grove* suggests that to be considered government speech, the speech must "unmistakably" come from the government. As support they quoted Justice Alito's statement in *Pleasant Grove* that the city's taking ownership of a monument and putting it on permanent display in a park "unmistakably signif [ied] to all Park visitors that the City intend[ed] the monument to speak on its behalf." 129 S.Ct. at 1134–35. The Plaintiffs contend that a person viewing this mural in the MDOL anteroom could not come to the conclusion that its contents "unmistakably signify[ ]" government speech.

First, the Court is not certain that the "unmistakably signify[ ]" language represents a legal standard. This language responded to the *Pleasant Grove* plaintiffs' contention that a privately donated monument should not be government speech unless a government entity goes "through ***189** a formal process of adopting a resolution

publicly embracing the message that the monument conveys." *Id.* at 1134. Justice Alito disagreed, in effect stating that such a formal process was unnecessary because the government's ownership and display of a monument in that case "unmistakably" conveyed the message that the monument was speaking for the government. In doing so, he was simply pointing out that in that case it was not difficult "to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech." *Id.* at 1132. From the Court's perspective, Justice Alito did not use "unmistakably" to create a minimum standard for the government speech doctrine to apply. Instead, he was responding to a party's contention that the government speech doctrine did not apply to the monument in that case, where in Justice Alito's view, it clearly did.

The Plaintiffs also argued that the Court should apply a "reasonableness" standard in determining whether the artwork in this case is government speech. They contended that Justice Souter adopted such a standard in his *Pleasant Grove* concurrence. There, Justice Souter wrote,

> To avoid relying on a *per se* rule to say when speech is governmental, the best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land.

Id. at 1142. The Court views Justice Souter's approach as useful but not binding. First, Justice Souter wrote in a concurrence, not joined by any of the other justices, so there is no binding authority to his suggested approach. Second, when later writing for the First Circuit in Griswold, Justice Souter did not apply his own suggested standard and instead observed that the government speech doctrine "is still in an adolescent stage of imprecision." 616 F.3d at 59 n. 6 (declining to decide whether the speech at issue was government speech).

Finally, it seems clear that neither Justice Alito nor Justice Souter intended the viewpoint of the observer to trump other factors in determining whether an item is government speech. *Pleasant Grove* itself describes a number of factors, including whether the government excluded other views, paid for the work, and was otherwise involved in the message, that would not be apparent in most cases by a casual or even sophisticated observer.

Nevertheless, accepting that the way a work of art strikes a member of the public is at least a proper factor under the government speech test, the Court is not convinced based on the limited facts before it that a member of the public who entered the MDOL anteroom, viewed this mural, and read the accompanying description would not come to the conclusion that MDOL commissioned and erected this mural in its anteroom because it reflected MDOL's viewpoint.

d. Government Speech and Viewpoint Neutrality

The Plaintiffs argue that even if the mural is government speech, "the government cannot exercise [its] discretion to make viewpoint-based restrictions on that speech." *Pls.' Reply* at 10. This contention is counter to the holdings in *Pleasant Grove* and subsequent government speech cases. The Supreme Court has plainly said that where the government is engaging in its own expressive conduct, "the Free Speech Clause has no application." 129 S.Ct. at 1131 (citing Justice Scalia's concurrence in *National Endowment for Arts v. Finley,* 524 U.S. 569, 598, 118 S.Ct. 2168, 141 L.Ed.2d 500 (1998) stating that ***190** "It is the very business of government to favor and disfavor points of view"). That statement alone leaves no room for the Plaintiffs' idea that a viewpoint analysis under the Free Speech Clause applies to government speech.

Yet the Court went further. It explained that the government could not be expected to be viewpoint neutral in its selection of expressive works because it could not be expected to represent every possible viewpoint. The Court stated that "[i]f government entities maintain viewpoint neutrality in their selection of donated monuments, they must either brace themselves for an influx of clutter' or face the pressure to remove longstanding and cherished monuments" *Id.* at 1138 (quoting *Summum v. Pleasant Grove City,* 499 F.3d 1170, 1175 (10th Cir.2007)). As an illustrative example, the Court stated that the United States did not have to accept a "Statue of Autocracy" to counterbalance the viewpoint expressed by the Statue of Liberty. *Id.*

Consistent with the Supreme Court's guidance, the First Circuit has implicitly rejected the idea that government speech must be viewpoint neutral. *Griswold* presented a similar case of a government rejecting certain speech on the basis of its viewpoint. There, the Commissioner of Elementary and Secondary Education of Massachusetts (the Commissioner) revised an advisory "curriculum guide" (the guide) in response to pressure from political groups to alter references to "Armenian genocide" and general relations between the Ottoman Empire's Turkish majority and Armenian minority populations in the late nineteenth and early twentieth centuries. 616 F.3d at 54–55. The Assembly of Turkish American Associations brought suit under 42 U.S.C. § 1983 alleging viewpoint discrimination. *Id.* at 55–56. The district court "held that the Guide was a form of government speech and, as such exempt from First Amendment scrutiny." *Id.* at 56. The First Circuit generally agreed. *Id.* ("We affirm the district court, although our reasoning differs slightly at times"). It first distinguished *Pico,* which is similarly relied on by Plaintiffs here, by noting that the plurality's opinion there was unique to "library protection." *Id.* at 56–57. Moreover, the *Griswold* Court noted that the plurality in *Pico* intended to reserve "curricular autonomy free of review by a court for viewpoint discrimination." *Id.* at 58. Accordingly, it would not extend *Pico* to encompass the idea that "any compliant response to an expression of political opinion critical of a school library's selection of books would violate a First Amendment right to free enquiry on the part of library patrons." *Id.* at 58.

While the First Circuit's decision did not rely entirely on the government speech doctrine, it noted that *Pleasant Grove* was one of "three strands of Supreme Court case law" supporting its view. *Id.* It stated that *Pleasant Grove* was part of a "developing body of law recognizing the government's authority to choose viewpoints when the government itself is speaking." *Id.* at 58–59. The *Griswold* Court decided that it did not have to decide definitively whether the guide was government speech to resolve the case. *Id.* at 59 n. 6. But it noted that its decision "against extending *Pico* " was consistent with the Ninth and Fifth Circuits, both of which "viewed the speech at issue as government speech." *Id.* (citing *Chiras v. Miller,* 432 F.3d 606 (5th Cir.2005) and *Downs v. L.A. Unified Sch. Dist.,* 228 F.3d 1003 (9th Cir.2000)). The First Circuit thus made two relevant proclamations in *Griswold:* it construed *Pleasant Grove* as holding that government speech is free to select its own viewpoint and found that *Pico* does not readily apply to free speech cases outside of the library context.

***191** At the TRO hearing, the Plaintiffs sought to distinguish *Griswold* on the grounds that it involved the Commissioner's removal of his own speech from the guide. The Court does not view that as a principled distinction. For one, the Court has found that the mural was government speech. Accordingly, just as the government was speaking when it put up the mural, the government was speaking when it took it down. Like in *Griswold,* the originator and the terminator of speech were effectively the same entity. Moreover, the Plaintiffs cite no authority for the idea that viewpoint-neutrality suddenly emerges when the individual terminating government speech is different from the individual who originated it.

Similarly, the Plaintiffs argued that *Griswold* is entirely dicta because the First Circuit established that the underlying action was time-barred before engaging in its First Amendment analysis. This Court disagrees. First, the *Griswold* opinion was handed down by the First Circuit, the appellate court to which this Court owes direct allegiance. Second, the Court further notes that *Griswold,* though a First Circuit opinion, was written by Associate Justice Souter, who was a member of the Supreme Court when *Pleasant Grove* was decided.

In addition to *Pico,* the Plaintiffs rely on *Sutliffe v. Epping,* 584 F.3d 314 (1st Cir.2009), to support their view that government speech must be viewpoint neutral. *Pls.' Reply* at 11. In *Sutliffe,* the First Circuit held that a town's refusal to add a hyperlink to a private group's website from the official town website constituted government speech. 584 F.3d at 329. The Plaintiffs argue that the case left open the possibility that government speech could still be subject to viewpoint-neutrality because the First Circuit stated that *Sutliffe* was not a case of viewpoint discrimination. *Pls.' Opp'n* at 11 (citing 584 F.3d at 331). However, as the Defendants assert in their sur-reply, the plaintiffs in *Sutliffe* did assert viewpoint discrimination. *Defs.' Sur-reply* at 5 n. 4 (citing 584 F.3d at 324).

Read in context, the First Circuit's recognition that this was not a viewpoint discrimination case does not represent the First Circuit's view that if it were, it would alter the government speech analysis. In characterizing the plaintiffs' viewpoint discrimination allegation, the *Sutliffe*

Court noted that the plaintiffs alleged that the town had provided a hyperlink to a private group's website to the exclusion of others. 584 F.3d at 324. However, in explaining that plaintiffs had failed to adequately allege viewpoint discrimination, the *Sutliffe* Court emphasized that the allegedly private group was actually a public event "conducted as part of a statewide program of the state university, which the Town had endorsed and provided financial sponsorship for." *Id.* at 332. The *Sutliffe* Court's emphasis on the public nature of the hyperlink included on the town website seems intended to convey that the hyperlink was government speech not subject to viewpoint neutrality. The First Circuit also acknowledged that the plaintiffs had failed to identify a viewpoint espoused by the challenged link, *id.* but it seems the purpose of that statement was merely to clarify that the plaintiffs would not have a viewpoint discrimination claim even if the challenged link were private speech.

Finally, as discussed earlier, the Plaintiffs cite *Serra* in support of their position that government speech must be viewpoint neutral. *Pls.' Reply* at 10. But the Second Circuit in *Serra* favorably quoted cases holding that governments can say what they wish when promulgating their own speech. 847 F.2d at 1048–49. It stated that "[t]he purpose of the First ***192** Amendment is to protect private expression and nothing in the guarantee precludes the government from controlling its own expression or that of its agents." *Id.* at 1048 (quoting *Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94 139 n. 7, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973)) (internal quotations omitted). However, the Second Circuit also relied on *Pico* to assert that even where the government owns the artwork, "it is still possible that the Government's broad discretion to dispose of its property could be exercised in an impermissibly repressive partisan or political manner." *Id.* at 1050. Moreover, it found that "If Serra had presented any facts to create a genuine issue as to whether [the government] was removing [the artwork] to condemn a political point of view or otherwise to trench upon First Amendment rights, we would require a trial, just as we did in *Pico.*" *Id.* at 1051.

The Court does not adopt those statements for several reasons. First, *Serra* is a Second Circuit opinion, not binding on this Court. Second, as explained *supra,* the First Circuit in *Griswold* construed *Pico's* holding as far more limited than did the Second Circuit. Finally, *Serra,* like *Pico,* came down before *Pleasant Grove, Johanns,* and other government speech cases. Significantly, the First Circuit in *Griswold* cited *Pleasant Grove* as part of "a developing body of law recognizing the government's authority to choose viewpoints when the government itself is speaking." 616 F.3d at 58–59. It further noted that government speech doctrine "is still at an adolescent stage of imprecision." *Id.* at 59 n. 6. *Pico* and *Serra,* having been decided more than twenty years before *Pleasant Grove* and *Griswold,* had the benefit of even less jurisprudence defining the contours of government speech. Indeed, the absence of the phrase "government speech" in both *Serra* and *Pico* suggests that it was not a coherent doctrine at the time those cases were decided. Since subsequent caselaw has stated that government speech need not be viewpoint-neutral, any suggestion to the contrary in *Serra* and *Pico* is unpersuasive.

In sum, the overwhelming weight of authority indicates that government speech may say what it wishes regardless of viewpoint, and the Plaintiffs are not likely to succeed in alleging a Free Speech Clause violation. Since there is unlikely to be any Free Speech Clause violation, the Plaintiffs are similarly unlikely to have standing for failure to state a cognizable injury.

D. Irreparable Harm

[5] At oral argument, the Court questioned Plaintiffs' counsel as to what made this case so urgent that they required a TRO as opposed to a preliminary injunction. Plaintiffs' counsel responded that the First Amendment implications gave it its urgency. The Court asked whether any of the named Plaintiffs were likely to experience a First Amendment violation in the time it took the Court to issue a ruling on the TRO or would likely do so before the Court issued a more contemplative order on a motion for preliminary injunction. Plaintiffs' counsel frankly conceded that none of the individual plaintiffs was likely to visit the MDOL within either timeframe and thus would not be likely to suffer a First Amendment violation. Therefore, it is undisputed that the denial of a TRO is unlikely to cause any "loss of First Amendment freedoms, for even minimal periods of time," as Plaintiffs originally alleged. *Pls.' Mot.* at 17 (quoting *Elrod v. Burns,* 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976)). This alone would justify the denial of the motion for TRO.

More to the point, however, is that the Plaintiffs' sole source of irreparable harm ***193** is the violation of their First Amendment rights. If the removal of the mural

were not government speech and were subject to the Free Speech Clause, the Plaintiffs would be correct. In *Elrod v. Burns,* a case quoted by the Plaintiffs, the United States Supreme Court wrote that "[t]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); *Asociacion de Educacion Privada de Puerto Rico, Inc. v. Garcia–Padilla,* 490 F.3d 1, 21 (1st Cir.2007) (same). But since the Court has resolved that the removal of the mural is government speech and not subject to the restrictions of the Free Speech Clause, the Plaintiffs have not presented any alternative basis for irreparable injury and have not satisfied this criterion.

E. Balance of Harms

The Court takes seriously the Defendants' contention that they would be harmed by a federal court issuing a mandatory order regarding a state government's handling of a political issue. *Defs.' Opp'n* at 9. On its face, such action confronts fundamental principles of federalism and separation of powers. *See e.g. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 473–74, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982) (cautioning that the exercise of judicial power to declare acts of the legislative or executive branches unconstitutional, though "a formidable means of vindicating individual rights, when employed unwisely or unnecessarily it is also the ultimate threat to the continued effectiveness of the federal courts in performing that role"); *Fair Assessment in Real Estate Ass'n, Inc. v. McNary,* 454 U.S. 100, 111–13, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981) (examining principles of federalism and comity underlying historical reluctance for federal courts to enjoin state government actions); *Brooks v. New Hampshire Supreme Court,* 80 F.3d 633, 635 (1st Cir.1996) ("Balancing responsibility between federal and state government in a republic that assigns interlocking sovereignty to each often requires federal courts to walk an unsteady tightrope. From a federal court's perspective, this special sort of judicial funambulism always must proceed in the spirit of cooperative federalism tempered, however, by the need to avoid the pitfalls inherent in blind deference to state autonomy").

[6] Just this past year, the Supreme Court reiterated the principle that "the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the state." *Levin v. Commerce Energy, Inc.,* ––– U.S. ––––, 130 S.Ct. 2323, 176 L.Ed.2d 1131 (2010) (quoting *Younger v. Harris,* 401 U.S. 37, 44, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971)). Even though the political question doctrine is "famously murky," *Doe v. Bush,* 323 F.3d 133, 141 (1st Cir.2003), it remains true that courts should avoid "undertaking tasks assigned to the political branches." *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 353, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006) (quoting *Lewis v. Casey,* 518 U.S. 343, 357, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996)).

By contrast to these and other considerations that militate against federal injunctive relief, the Court has discussed its conclusion that the Plaintiffs have demonstrated no cognizable competing harm that would justify the extraordinary relief they are seeking.

F. Public Interest

The public interest depends upon individual perspective. However, what seems ***194** clear is that the physical removal of the mural did not remove the mural and its message from the public eye. Far from it. The mural, which had previously hung in an obscure corner of a small state anteroom known only to a few, is now center stage in a roiling, vigorous and widely-reported controversy. The merits of the mural, as a work of art, as a neutral rendition of historical fact, as a biased depiction in support of organized labor, have been publicly aired, debated, and editorialized. Although it may be counterintuitive, the immediate result of the suppression of this work of art has been the generation of considerable public speech about this work of art.

Nevertheless, the Court acknowledges that for some, the removal of the mural will always be an impermissible governmental suppression of free speech and for others, the removal will always be one administration's rightful rejection of forced political speech from a prior administration.

III. CONCLUSION

It is not the business of the federal court to decide what messages the elected leaders of the state of Maine should send about the policies of the state, to tell a prior administration that its own artwork is too slanted to continue to hang on state office walls, to tell the current

administration that it must not remove or replace a prior administration's artwork, or to tell a future administration which piece of state art, the new or the old, must stay or go. The messages from the state-owned works of art are government speech and Maine's political leaders, who are ultimately responsible to the electorate, are entitled to select the views they want to express.

The Court DENIES the Plaintiffs' Motion for TRO (Docket # 9).[7]

7 The Court discussed with counsel the fact that the motion for TRO was something of a hybrid between a motion for TRO and a motion for preliminary injunction. The Court will schedule a telephone conference of counsel to discuss where the case should proceed from here.

SO ORDERED.

All Citations

789 F.Supp.2d 172

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KeyCite Yellow Flag - Negative Treatment
Declined to Follow by White v. City of Sparks, D.Nev., August 5, 2004

759 F.2d 625
United States Court of Appeals,
Seventh Circuit.

Albert R. PIAROWSKI, Plaintiff-Appellant,
v.
ILLINOIS COMMUNITY COLLEGE DISTRICT 515, Prairie State College, et al., Defendants-Appellees.

No. 84-1152.
|
Argued Feb. 26, 1985.
|
Decided April 12, 1985.
|
Rehearing En Banc Denied May 10, 1985.

Synopsis

Chairman of art department brought section 1983 action against junior college and various officials thereof, claiming violation of his First Amendment rights by reason of demands that he relocate certain of his artworks to an alternative site on campus. The United States District Court for the Northern District of Illinois, James B. Parsons, Senior District Judge, rendered judgment for the defendants, and chairman appealed. The Court of Appeals, Posner, Circuit Judge, held that: (1) fact that authority to organize exhibits in art gallery had been delegated to chairman and another art professor did not constitutionally preclude college from participating in those decisions, and (2) junior college officials did not abridge First Amendment rights of chairman of art department by requiring that certain of his works which, though not obscene in legal sense, were objected to as sexually explicit and racially offensive be relocated from gallery occupying an alcove off heavily trafficked campus mall to an alternative site, at least where the expression was not political, officials did not purport to prevent altogether the exhibition, and chairman occupied responsible administrative as well as academic position, reflecting upon the college itself and suggesting its condonation.

Affirmed.

West Headnotes (10)

[1] **Constitutional Law**
Art
Constitutional Law
Political Speech, Beliefs, or Activity in General
Constitutional Law
Entertainment

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1576 Art
(Formerly 92k90.1(1))
92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(F) Politics and Elections
92k1681 Political Speech, Beliefs, or Activity in General
(Formerly 92k90.1(1))
92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(N) Entertainment
92k1885 In General
(Formerly 92k90.1(1), 92k90.1(6))

Freedom of speech and press protected by the First Amendment embraces purely artistic as well as political expression, and entertainment falling far short of anyone's idea of "art," unless the artistic expression is obscene in the legal sense. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[2] **Constitutional Law**
Access to Facilities and Other Public Places; Public Forum Issues
Constitutional Law
Employees

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Q) Education

92XVIII(Q)2 Post-Secondary Institutions
92k2006 Access to Facilities and Other Public Places;Public Forum Issues
92k2007 In General
(Formerly 92k90.1(7.3), 92k90.1(1.4))
92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Q) Education
92XVIII(Q)2 Post-Secondary Institutions
92k2016 Employees
92k2017 In General
(Formerly 92k90.1(7.3))

If college had opened up art gallery to the public to use as place for expression, it could not have regulated that expression any way it pleased just because the gallery was its property or because the artist happened to be member of the college's faculty, though artist's status as an employee would give college more control over his activities than over a stranger's, yet not unlimited control. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[3] **Constitutional Law**
Access to Facilities and Other Public Places;Public Forum Issues

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Q) Education
92XVIII(Q)2 Post-Secondary Institutions
92k2006 Access to Facilities and Other Public Places;Public Forum Issues
92k2007 In General
(Formerly 92k90.1(1.4))

For First Amendment purposes, occasional use of college art gallery by outsiders was not enough to make it a public forum. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[4] **Constitutional Law**
Access to Facilities and Other Public Places;Public Forum Issues

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Q) Education
92XVIII(Q)2 Post-Secondary Institutions
92k2006 Access to Facilities and Other Public Places;Public Forum Issues
92k2007 In General
(Formerly 92k90.1(1.4))

Faculty, unlike students, are employees, and it would make nonsense of concept of public forum to say that, because the employees of public employer naturally have use of employer's property, which is where they work, it is a public forum for First Amendment purposes; they are not members of the public. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[5] **Constitutional Law**
Employees

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Q) Education
92XVIII(Q)2 Post-Secondary Institutions
92k2016 Employees
92k2017 In General
(Formerly 92k90.1(7.3))

It may be assumed that public colleges do not have carte blanche to regulate expression of ideas by faculty members in the parts of the college that are not public forums, though the term "academic freedom" as an aspect of the freedom of speech protected against governmental abridgement by the First Amendment is equivocal. U.S.C.A. Const.Amend. 1.

14 Cases that cite this headnote

[6] **Constitutional Law**
Particular Issues and Applications in General

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General

92k1545 In General
(Formerly 92k90.1(1))
For First Amendment purposes, relocation of expressive conduct or materials is not suppression, and, if reasonable, is not forbidden. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[7] **Constitutional Law**
Access to Facilities and Other Public Places;Public Forum Issues

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Q) Education
92XVIII(Q)2 Post-Secondary Institutions
92k2006 Access to Facilities and Other Public Places;Public Forum Issues
92k2007 In General
(Formerly 92k90.1(1.4))
Even if junior college art gallery were a public forum, college officials' action in demanding that certain works objected to as sexually explicit and racially offensive be relocated to another part of the building was not forbidden by the First Amendment. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[8] **Constitutional Law**
Freedom of Speech, Expression, and Press

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1490 In General
(Formerly 92k90(1))
Concept of freedom of expression ought not to be pushed to doctrinaire extremes. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[9] **Constitutional Law**
Access to Facilities and Other Public Places;Public Forum Issues

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Q) Education
92XVIII(Q)2 Post-Secondary Institutions
92k2006 Access to Facilities and Other Public Places;Public Forum Issues
92k2007 In General
(Formerly 92k90.1(1.4))
Fact that junior college had delegated to plaintiff and another art professor authority to organize exhibits in art gallery did not constitutionally preclude college from participating in decisions as to whether certain works were appropriate for display in that particular gallery, owing to its proximity to heavily trafficked thoroughfare. U.S.C.A. Const.Amend. 1.

6 Cases that cite this headnote

[10] **Constitutional Law**
Employees

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Q) Education
92XVIII(Q)2 Post-Secondary Institutions
92k2016 Employees
92k2017 In General
(Formerly 92k90.1(1.4))
Junior college officials did not abridge First Amendment rights of chairman of art department by requiring that certain of his works which, though not obscene in legal sense, were objected to as sexually explicit and racially offensive be relocated from gallery occupying an alcove off heavily trafficked campus mall to an alternative site, at least where the expression was not political, officials did not purport to prevent altogether the exhibition, and chairman occupied responsible administrative as well as academic position, reflecting upon the college itself and suggesting its condonation. U.S.C.A. Const.Amend. 1.

7 Cases that cite this headnote

Attorneys and Law Firms

***626** Harvey Grossman, Roger Baldwin, Chicago, Ill., for plaintiff-appellant.

John M. Collins, Jr., Cowen, Crowley & Hager, Chicago, Ill., for defendants-appellees.

Before WOOD and POSNER, Circuit Judges, and FAIRCHILD, Senior Circuit Judge.

Opinion

POSNER, Circuit Judge.

Prairie State College is a junior college owned by the State of Illinois and located just to the south of Chicago; it has 6,000 students. Albert Piarowski is the chairman of its art department. The president and other top officials of the college, defendants along with the college in this federal civil-rights suit under ***627** 42 U.S.C. § 1983, ordered Piarowski to remove from a public exhibit in the college three works of art that he had created and was displaying there. He claims that by doing this the defendants (whose action, none deny, was state action) violated his rights under the First Amendment, made applicable to the states by interpretation of the Fourteenth Amendment. After a bench trial, the district court gave judgment for the defendants, and Piarowski appeals. Although the underlying dispute is not rare in the art world, see DuBoff, The Deskbook of Art Law, ch. VIII (1977), we have found only two cases that resemble this. In *Close v. Lederle,* 424 F.2d 988 (1st Cir.1970), an art instructor at a state university, after being invited to exhibit his paintings in a busy corridor, was made to remove them because they were sexually explicit; the First Circuit found no violation of the First Amendment. *Appelgate v. Dumke,* 25 Cal.App.3d 304, 101 Cal.Rptr. 645 (1972), has similar facts, but went off on waiver grounds.

On the main floor of Prairie State College's principal building is a large open area, the "mall." A room 27 feet by 21 feet in size, the "gallery," adjoins the mall near the entrance to the building. No wall separates the gallery from the mall; the gallery is thus an alcove off the mall. A cafeteria, a book store, and a number of other facilities also open onto the mall, and the part of the mall that adjoins the gallery doubles as a student lounge. The mall is the college's main gathering place and thoroughfare; the classrooms are on the upper floors of the same building.

Piarowski and another member of the art department are the gallery coordinators, meaning that they are in charge of arranging art exhibits for the gallery-exhibits of student work picked by members of the faculty, exhibits of the work of outside artists invited by the coordinators, and finally exhibits of art work by members of the faculty. The college has set no criteria for picking works to be exhibited in the gallery, leaving the matter to the coordinators' judgment.

On March 3, 1980, the "Art Department Faculty Exhibition," an annual affair to which the coordinators invite all the members of the department to contribute (there are four full-time members), opened with works by all four members. Each had decided which of his works to exhibit. Piarowski contributed eight stained-glass windows. Five were abstract; three were representational and became the focus of controversy. One depicts the naked rump of a brown woman, and sticking out from (or into) it a white cylinder that resembles a finger but on careful inspection is seen to be a jet of gas. Another window shows a brown woman from the back, standing, naked except for stockings, and apparently masturbating. In the third window another brown woman, also naked except for stockings and also seen from the rear, is crouching in a posture of veneration before a robed white male whose most prominent feature is a grotesquely outsized phallus (erect penis) that the woman is embracing.

Although when described in words the three stained-glass windows (especially the third) sound pretty obscene, the defendants do not argue that the windows are obscene in the legal sense. The windows are not very realistic; seem not intended to arouse, titillate, or disgust; and are not wholly devoid of artistic merit, or at least artistic intention. They are in the style of Aubrey Beardsley, the distinguished *fin de siècle* English illustrator. Two of Piarowski's windows are imitations of two of Beardsley's illustrations for *Lysistrata,* Aristophanes' comedy, itself sexually explicit, about wives who go on a sex strike in an effort to end the Peloponnesian War. On his deathbed Beardsley ordered his illustrations for *Lysistrata* destroyed as obscene, Weintraub, Aubrey Beardsley:

Imp of the Perverse 258 (1976), but the order was not carried out; and though some of the illustrations, with their immense and graphic phalluses, see, e.g., Wilson, Beardsley, pl. 38 (3d ed. 1983), might well be considered indecent even today, the originals are on public display in-with nice irony-the Victoria and Albert Museum. See Weintraub, *supra,* at 199 n. 1. The window with the ***628** phallus is based on a forged Beardsley drawing entitled "Adoration of the Penis."

Piarowski testified that he never intended the women in the windows to be taken to be Negro women; he used brown glass (he said amber, but the women in two of the windows are darker than that) for contrast. The women could, indeed, be taken to be Polynesian rather than Negro (but they are too dark to be Greek). Of course the "Adoration of the Penis" window would not have been less offensive if the man had been dark and the woman light.

The three windows were clearly visible from the mall, and they provoked a number of complaints from students, cleaning women, and black clergymen, though it is not clear that the clergymen actually saw the windows. Prairie State College serves a community in which Aubrey Beardsley is not a household word; almost half the students are night students, three-fourths are part-time rather than full-time students, and the college has no admission requirements. Anyway the exhibit did not mention Beardsley. After ten days the defendants ordered Piarowski to remove the windows. They suggested he exhibit them in a room on the fourth floor (the floor on which the art department's classrooms are located) that in its one year in use as an exhibit room had been used only for exhibiting photography. The room is smaller than the gallery (10 feet by 25 feet) but large enough to hold all of Piarowski's windows and indeed the whole exhibit. Although the room was being used for another exhibit at the time and it appears, though not clearly, that it would not have been free till the summer (the college is in session during the summer), the defendants may not have known that the room was in use-there is nothing in the record on this question. And they may, for all we know, have been willing to move the photography exhibit somewhere else. Their directive to Piarowski left room for counterproposals: "... the three stained glass pieces ... are to be removed from the mall of the college as soon as possible. If you feel that an alternative place for exhibiting these pieces is needed, the gallery on the fourth floor will be acceptable. Thank you for your cooperation." No counterproposals were forthcoming. Piarowski did not even tell the defendants that the fourth-floor room was occupied. Apparently his objection to exhibiting the windows in that room was not that it was unavailable but that it was out of the way and, more important, that the exhibit should not be broken up.

When Piarowski refused to remove the windows, one of the defendants removed them. That was on Friday, March 14. On Monday the art department voted to close the exhibit rather than break it up and it closed two weeks after it had opened, which is to say a week before it was scheduled to close. In retrospect the defendants might have been wiser to have suffered the exhibit to continue intact for another week and have thereby avoided this lawsuit.

[1] **[2]** Piarowski intended no political statement by the content and coloring used in his windows, no disparagement of women or blacks, no commentary on relations between the sexes or between the races. The windows were art for art's sake. But the freedom of speech and of the press protected by the First Amendment has been interpreted to embrace purely artistic as well as political expression (and entertainment that falls far short of anyone's idea of "art," such as the topless dancing in *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 932-34, 95 S.Ct. 2561, 2568-69, 45 L.Ed.2d 648 (1975)), unless the artistic expression is obscene in the legal sense. See, e.g., *Miller v. California,* 413 U.S. 15, 34-35, 93 S.Ct. 2607, 2620-21, 37 L.Ed.2d 419 (1973). And if the college had opened up the gallery to the public to use as a place for expression it could not have regulated that expression anyway it pleased just because the gallery was its property, *Perry Education Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983), or because the artist happened to be a member of the college's faculty. Cf. ***629** *Pickering v. Board of Education,* 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968); *Knapp v. Whitaker,* 757 F.2d 827 (7th Cir.1985). The artist's status as an employee would give the college more control over his activities than over a stranger's, cf. *id.,* at 842; *McMullen v. Carson,* 754 F.2d 936, 938-39 (11th Cir.1985); *Clark v. Holmes,* 474 F.2d 928 (7th Cir.1972) (per curiam), but not unlimited control.

[3] But the public was not allowed to exhibit in the gallery; unlike the municipally operated theater in

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975), where outside producers put on plays for the entertainment of the general public, the gallery was not generally available for outsiders to use to display their work. That Piarowski sometimes invited artists from outside the college to exhibit their work in the gallery no more made the gallery a public forum than a teacher's inviting a guest lecturer to his classroom would make the classroom a public forum. The record is silent on how often the work of outside artists was exhibited. The district judge found that the gallery was never used by outsiders, which is clearly wrong. But Piarowski strays from the record, too, when he says in his brief that outsiders were "regularly invited" to exhibit in the gallery-there just is no evidence of that. Occasional use by outsiders, which is all that this record shows, is not enough to make a college art gallery a public forum. See *Perry Education Ass'n v. Perry Local Educators' Ass'n, supra,* 460 U.S. at 47, 103 S.Ct. at 956.

[4] Although *Widmar v. Vincent,* 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), held that a state university could not bar religious student groups from its facilities while letting secular student groups use them, the student groups were autonomous; their relationship to the university administration was the same as that of the theatrical producers in *Southeastern Promotions* to the municipal theater. Prairie State College has not given student groups free access to the gallery, and Piarowski is not a student; indeed, as chairman of the art department and gallery coordinator, he is a part of the college administration. Faculty, unlike students, are employees, and it would make nonsense of the concept of public forum to say that because the employees of a public employer naturally have the use of the employer's property, which is where they work, it is a public forum. They are not members of the public.

[5] **[6]** We may assume, however, that public colleges do not have carte blanche to regulate the expression of ideas by faculty members in the parts of the college that are not public forums. We state this as an assumption rather than a conclusion because, though many decisions describe "academic freedom" as an aspect of the freedom of speech that is protected against governmental abridgment by the First Amendment, see, e.g., *Sweezy v. New Hampshire,* 354 U.S. 234, 250, 77 S.Ct. 1203, 1213, 1 L.Ed.2d 1311 (1957) (plurality opinion); *id.* at 262-63, 77 S.Ct. at 1217-18 (concurring opinion); *Keyishian v. Board of Regents,* 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629 (1967); *Dow Chem. Co. v. Allen,* 672 F.2d 1262, 1274-76 (7th Cir.1982); *Gray v. Board of Higher Education,* 692 F.2d 901, 909 (2d Cir.1982); Note, *Academic Freedom in the Public Schools: The Right to Teach,* 48 N.Y.U.L.Rev. 1176 (1973), the term is equivocal. It is used to denote both the freedom of the academy to pursue its ends without interference from the government (the sense in which it used, for example, in Justice Powell's opinion in *Regents of the University of California v. Bakke,* 438 U.S. 265, 312, 98 S.Ct. 2733, 2759, 57 L.Ed.2d 750 (1978), or in our recent decision in *EEOC v. University of Notre Dame Du Lac,* 715 F.2d 331, 335-36 (7th Cir.1983)), and the freedom of the individual teacher (or in some versions-indeed in most cases-the student) to pursue his ends without interference from the academy; and these two freedoms are in conflict, as in this case. The college authorities were worried that Piarowski's stained-glass windows, created by the chairman of the college's art department and exhibited in ***630** an alcove off the college's main thoroughfare, would convey an image of the college that would make it harder to recruit students, especially black and female students. If we hold that the college was forbidden to take the action that it took to protect its image, we limit the freedom of the academy to manage its affairs as it chooses. We may assume without having to decide that the college's interest was not great enough to have justified forbidding Piarowski to display the windows anywhere on campus, but it may have been great enough to justify ordering them moved to another gallery in the same building. *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), after all, upheld an ordinance regulating the location of "adult" movie theaters; and the plurality opinion states that sexually explicit though nonpornographic art can be regulated more broadly than political speech. See *id.* at 70, 96 S.Ct. at 2452. It cannot on that account be suppressed altogether; but as *Young* suggests, relocation is not suppression, and if reasonable is not forbidden.

[7] This conclusion holds even if we are wrong to think the gallery not a public forum. If it was one, then so was the photography gallery on the fourth floor, and any other room in the main building that would have been suitable for the exhibit; and all together could be viewed as a single public forum for the exhibition of art. A decision as to where within a public forum to display sexually explicit art is less menacing to artistic freedom than a decision to exclude it altogether.

[8] The concept of freedom of expression ought not be pushed to doctrinaire extremes. No museum or gallery, public or private, picks the most prominent place in the museum to display those works in its collection that are most likely to offend its patrons; and even though the consequence of its decision is to discourage-though very mildly we should think-the production of art calculated to shock, to outrage, to *épater le bourgeois,* we do not think the decision has constitutional significance. If Piarowski had given to the man's face in his pastiche of "Adoration of the Penis" the unmistakable likeness of the chairman of the college's board of trustees, we doubt that we would be hearing the argument that the First Amendment prevents any tampering with the siting of a work of art; it would be reasonable in such a case for the college to order the stained-glass window moved to a less conspicuous spot on the campus-especially when the window had been created by an employee of the college, and not just by any employee but by the chairman of the art department and gallery coordinator. Coming closer to the actual facts of this case, if Piarowski had entitled the windows, "Typical Prairie State Coeds," we do not think the college would have been forbidden to order the windows moved to a more discreet location. Or if a member of the art department had submitted such a work of art for display at an exhibit, Piarowski would not have violated the First Amendment by refusing, in his capacity as gallery coordinator, to display it in a conspicuous place. If Claes Oldenburg, who created a monumental sculpture in the shape of a baseball bat for display in a public plaza in Chicago, had created instead a giant phallus, the city would not have had to display it next to a heavily trafficked thoroughfare. The first-floor gallery in Prairie State College's main building is a place of great prominence and visibility, implying college approval rather than just custody, and the offending windows could be seen by people not actually in the gallery. There is no constitutional right to exhibit sexually graphic works of art in a gallery that is missing an outside wall.

[9] At argument Piarowski's able counsel conceded that there would have been no violation of the First Amendment if the defendants had put up venetian blinds to screen the gallery from the mall. This concession acknowledges, quite properly in our view, the existence of some scope for a managerial judgment concerning access to sexually frank pictorial art, even a judgment influenced by the offensive nature of ***631** the art. Cf. *Avins v. Rutgers,* 385 F.2d 151 (3d Cir.1967). But we are told that while Piarowski could not have compelled the college to allow him to exhibit offensive art works in the most prominent place of exhibition, once they were exhibited they could not be ordered moved, even to another gallery in the same building; that having delegated the organizing of exhibits in the gallery to Piarowski and another art professor, the college was constitutionally required to forgo any participation in those decisions-even though Piarowski, when forced to decide whether to exhibit his own work, had a potential conflict of interest between his career objectives as an artist and his managerial responsibilities as a gallery administrator.

[10] Neither the distinction between location and relocation nor the concept of irrevocable delegation is a persuasive ground for reversing the district court. What the parties call the gallery is not to be compared to the National Gallery of Art in Washington, D.C. A room of modest dimensions, it is not even the entire exhibit space of the college, for we know that photographic art is exhibited in a different, although smaller, room on a separate floor. As for the idea that there is a ratchet in play, such that the college could have prevented Piarowski from exhibiting the three stained-glass windows in the gallery in the first place but could not order them removed, we cannot imagine what policy of the First Amendment would be served by making sequence determine outcome. The college authorities did not have to ignore the controversy created by Piarowski's windows. If the college had done nothing it might have been thought to be endorsing the windows by allowing them to be displayed so prominently right off the main thoroughfare, and near the main entrance, of the college. Piarowski's positions as chairman of the art department and gallery coordinator, to the extent known, would enhance the impression of official approval. And while hanging venetian blinds might have limited the audience for the stained-glass windows less than moving them to a less conspicuous exhibition site, we do not think the Constitution requires drawing such fine lines. If the gallery had had two rooms, a front and a back, and the defendants instead of putting up venetian blinds had told Piarowski to move his windows to the back room, the abridgment of free expression would have been trivial. Instead the college had (at least) two rooms, in the same building, suitable for exhibits-only the rooms were not contiguous. The difference between a walk and an elevator ride is not of constitutional dimensions.

If showing Piarowski's work separately from that of the other artists represented in the exhibit might have reduced the exhibit's quality, Piarowski could have suggested moving the entire exhibit to another room, which he did not do. But the premise is in any event dubious. Since the exhibit was simply a group of self-selected works by the members of the department, it is not obvious that it had an artistic integrity to be violated. Piarowski testified that the three objectionable windows were "totally different" from his five other windows (which were abstract rather than representational), although he wanted them exhibited together in order to demonstrate the versatility of stained glass as an artistic medium.

To hold the defendants liable to Piarowski for ordering his work relocated would have disturbing implications for the scope of federal judicial intervention in the affairs of public museums and art galleries. Distinguished public galleries such as the Metropolitan Museum of Art in New York and the National Gallery of Art in Washington would have to worry that if they refused to flaunt their most offensive works of art they might be held to have violated the constitutional rights of artist, donor, or viewer. Nor would it be right to equate Piarowski and the art department to the museum, and the college administrators to a state agency telling the museum what it can and can't exhibit, and where. The gallery was a single room in the college. Piarowski was no more its proprietor than a junior curator at the Metropolitan Museum of Art is the proprietor of the ***632** displays he arranges. It cannot be right that if any authority whatever is delegated to a curator, the owner of the museum-the college in this case-is helpless to correct the curator's errors of taste. The precept that in museum management "good taste is the first refuge of the witless," Museum of the City of New York, Explorations of the Ways, Means, and Values of Museum Communication With the Viewing Public 53 (1969) (remarks of Harley Parker); but see Burcaw, Introduction to Museum Work 177 (1975), is not yet engraved in constitutional law.

We emphasize that the college did not offer Piarowski the fourth-floor gallery as an alternative site on a take-it-or-leave-it basis, and may not have known it was already occupied. The college was apparently open for counterproposals, but none were forthcoming. The idea of venetian blinds-even of a disclaimer of college sponsorship or endorsement-was not forthcoming. Piarowski did not tell the defendants that the fourth-floor gallery was occupied, which might have caused the defendants to rethink their edict of removal, especially since the exhibit had only 10 days left to run when the storm arose. Common sense tells us that the chairman of the art department must have known better than anyone else in the college which if any alternative sites might be acceptable to show his art; and if none were acceptable, he should have said so, and did not. He seems to have been more interested in becoming a martyr to artistic freedom than in finding another room in the building to exhibit his work, or persuading the defendants to back off by demonstrating to them the absence of any reasonable alternatives, though we hesitate to conclude that he waived his First Amendment rights like the artist in *Appelgate v. Dumke, supra.*

This is an easier case than *Close v. Lederle, supra,* where the issue was removal, not relocation, though there was a finding there, and not here, that children used the corridor in which the offensive art was hung. If the defendants had said to Piarowski, you cannot exhibit such work anywhere on campus, Piarowski might have been discouraged from creating similar work in the future; for Prairie State College is the most natural site for a member of its art department to exhibit his work. The discouragement is much less, and hence the abridgment of freedom of expression is less, when the college says to him, you may exhibit your work on campus-just not in the alcove off the mall. Although this location maximized the artist's audience, the impact, both on his incentive to create controversial works of art and on the accessibility of those works to the viewing public, of moving it to another place (and we do not mean the broom closet) in the same building would have been slight.

Sefick v. City of Chicago, 485 F.Supp. 644 (N.D.Ill.1979), which questioned *Close* en route to invalidating the revocation by the City of Chicago of permission to display sculptures in the lobby of a city building, is distinguishable from the present case both because the motive for revocation was political (the sculptures satirized the city's mayor) and because the issue, as in *Close,* was removal rather than relocation. Not every trivial alteration of the site of an art exhibit-not every modest yielding to public feeling about sexually explicit and racially insulting art-is an abridgment of freedom of expression.

When we consider that the expression in this case was not political, that it was regulated rather than suppressed,

that the plaintiff is not only a faculty member but an administrator, that good alternative sites may have been available to him, and that in short he is claiming a First Amendment right to exhibit sexually explicit and racially offensive art work in what amounts to the busiest corridor in a college that employs him in a responsible administrative as well as academic position, we are driven to conclude that the defendants did not infringe the plaintiff's First Amendment rights merely by ordering him to move the art to another room in the same ***633** building. The judgment of the district court dismissing the complaint is therefore

AFFIRMED.

All Citations

759 F.2d 625, 24 Ed. Law Rep. 46

KeyCite Yellow Flag - Negative Treatment
Called into Doubt by Newton v. LePage, D.Me., April 22, 2011

847 F.2d 1045
United States Court of Appeals,
Second Circuit.

Richard SERRA, Plaintiff–Appellant,
v.
UNITED STATES GENERAL SERVICES ADMINISTRATION; Terrence C. Golden, Administrator, General Services Administration; William F. Sullivan, Commissioner, Public Buildings Service, General Services Administration; William J. Diamond, Regional Administrator (Region Two), General Services Administration, Officially and Individually; Dwight Ink, Former Acting Administrator, General Services Administration, Individually, Defendants–Appellees.

Nos. 822, 823, Dockets 87–6231, 87–6251.
|
Argued March 4, 1988.
|
Decided May 27, 1988.

Synopsis
Artist who was commissioned to create and sell sculpture to the federal government brought suit challenging the government's subsequent decision to relocate the sculpture. The United States District Court for the Southern District of New York, Milton Pollack, J., 667 F.Supp. 1042, granted summary judgment against artist on constitutional claim, and he appealed. The Court of Appeals, Jon O. Newman, Circuit Judge, held that: (1) artist relinquished his free speech rights in his sculpture when he sold it to the government; (2) even if artist retained some First Amendment interest in the continued display of the sculpture, removal of the sculpture was a permissible time, place, and manner restriction; (3) to extent that government's decision may have been motivated by sculpture's lack of aesthetic appeal, decision was permissible; and (4) relocation decision did not violate due process.

Affirmed.

West Headnotes (7)

[1] **Constitutional Law**
Art

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1576 Art
(Formerly 92k90.1(1))

Artwork may under some circumstances be “speech” for First Amendment purposes, but First Amendment has only limited application where the artistic expression belongs to the government rather than a private individual. U.S.C.A. Const.Amend. 1.

9 Cases that cite this headnote

[2] **Constitutional Law**
Government-Sponsored Speech

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1563 Government-Sponsored Speech
(Formerly 92k90.1(1))

Government may advance or restrict its own speech in a manner that would clearly be forbidden were it regulating the speech of a private citizen. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[3] **Constitutional Law**
Estoppel, Waiver, or Forfeiture

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(B) Estoppel, Waiver, or Forfeiture
92k945 In General
(Formerly 92k43(1))

Artist relinquished his free speech rights in his sculpture when he sold it to the government, and thus government's decision

to subsequently relocate the sculpture did not violate the artist's First Amendment rights. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[4] **Constitutional Law**
Public Squares, Plazas, and Greens

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1758 Public Squares, Plazas, and Greens
(Formerly 92k90.1(4))

Even if artist retained free speech rights in his sculpture after he sold it to the government, government's decision to subsequently relocate the sculpture was a permissible time, place, and manner restriction and did not violate the artist's First Amendment rights; government had significant interest in keeping plaza unobstructed, an interest that could be furthered only by removing the sculpture. U.S.C.A. Const.Amend. 1.

8 Cases that cite this headnote

[5] **Constitutional Law**
Art

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1576 Art
(Formerly 92k90.1(1))

Artist failed to prove that government made content-based decision to relocate sculpture after government commissioned sculpture from artist and purchased it from him, and thus relocation decision did not violate artist's First Amendment rights; while agency official may have believed that the sculpture was ugly, there was no assertion of facts to indicate that agency officials understood the sculpture to be expressing any particular idea, much less that they sought to remove the sculpture to restrict such expression or convey their own disapproval of the sculptor's message. U.S.C.A. Const.Amend. 1.

6 Cases that cite this headnote

[6] **Constitutional Law**
Art

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1576 Art
(Formerly 92k90.1(1))

Even if government's decision to relocate sculpture it had commissioned was motivated by sculpture's lack of aesthetic appeal, decision did not violate First Amendment rights of artist. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[7] **Constitutional Law**
Reputation;Defamation

Constitutional Law
Control and Use in General

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)1 In General
92k4040 Reputation;Defamation
(Formerly 92k254.1)
92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)4 Government Property, Facilities, and Funds
92k4101 Control and Use in General
(Formerly 92k254.1)

Government's decision to relocate sculpture it had commissioned from artist did not violate artist's due process rights; artist had no protected property interest in sculpture's continued display after he sold sculpture to the government, and, though artist might suffer injury to his reputation as result

of relocation of sculpture, such an injury without accompanying loss of government employment would not be a constitutionally cognizable deprivation of property or liberty. U.S.C.A. Const.Amends. 5, 14.

2 Cases that cite this headnote

Attorneys and Law Firms

***1046** Jay Topkis, New York City (Leslie Urfirer Cornfeld, Paul, Weiss, Rifkind, Wharton & Garrison, and Gustave Harrow, New York City on the brief), for plaintiff-appellant.

Richard M. Schwartz, Asst. U.S. Atty., New York City (Rudolph W. Giuliani, U.S. Atty., Richard W. Mark, Asst. U.S. Atty., New York City, Clyde C. Pearce, Jr., Gen. Counsel, Barbara G. Gerwin, Regional Counsel, Washington, D.C., on the brief), for defendants-appellees.

Before NEWMAN and KEARSE, Circuit Judges, and CEDARBAUM, District Judge. *

* The Honorable Miriam Goldman Cedarbaum of the United States District Court for the Southern District of New York, sitting by designation.

Opinion

JON O. NEWMAN, Circuit Judge:

This appeal presents the question whether the removal of a government-owned artwork from federal property violates the free expression and due process rights of the artist. Richard Serra, a prominent American sculptor, brought the action seeking to bar the United States General Services Administration (GSA) from removing his controversial sculpture "Tilted Arc" from Federal Plaza in lower Manhattan. The District Court for the Southern District of New York (Milton Pollack, Judge) granted summary judgment against Serra on his constitutional claims. For the reasons that follow, we affirm the judgment of the District Court.

Background

The facts and procedural history of this case are comprehensively set forth in the two opinions of the District Court, *Serra v. United States General Services Administration,* 664 F.Supp. 798 (S.D.N.Y.1987), and *Serra v. United States General Services Administration,* 667 F.Supp. 1042 (S.D.N.Y.1987). We set forth only those facts necessary for an understanding of the present appeal.

In 1979, GSA selected Serra to create an outdoor sculpture to be installed on the plaza adjacent to the federal office complex ***1047** at 26 Federal Plaza in lower Manhattan (the "Plaza" or "Federal Plaza"). The sculpture was commissioned under GSA's art-in-architecture program pursuant to which one half of one percent of the construction cost of federal buildings is reserved for the funding of artworks by living American artists. Serra is an internationally renowned sculptor, known primarily for his "site-specific" work. According to Serra, a site-specific sculpture "is one which is conceived and created in relation to the particular conditions of a specific site." Site-specific sculpture is meaningful only when displayed in the particular location for which it is created; such works are not intended to be displayed in more than one place. Serra's site-specific works consist primarily of steel plates or "forgings" that are welded together to form large abstract forms. Serra's sculptures have been displayed in many prominent locations throughout the world, including the Tuilleries Gardens in Paris.

In September 1979, Serra signed a contract with GSA setting forth the terms of his commission. The contract provided that Serra would receive a fee of $175,000 for building a sculpture on Federal Plaza. The contract further provided that "all designs, sketches, models, and the work produced under this Agreement ... shall be the property of [the United States]." The contract contained no provisions restricting the Government's use of the sculpture after it was purchased.

"Tilted Arc" was completed and installed at Federal Plaza in 1981. The work is an arc of steel 120 feet long, 12 feet tall, and several inches thick. It is fabricated out of Cor–Ten steel, a material designed to oxidize naturally over time. Consequently, the work is now coated with what the artist refers to as "a golden amber patina" and what the sculpture's critics refer to as "rust." The sculpture bisects Federal Plaza. According to Serra, "Tilted Arc" is site-specific: It was designed for the Federal Plaza and is

artistically inseparable from its location. Serra maintains that removing "Tilted Arc" to another site will destroy it.

The pigeons had barely begun to roost on "Tilted Arc" before the sculpture became the object of intense public criticism. GSA received hundreds of letters from community residents and federal employees complaining about the sculpture's appearance and its obstruction of Federal Plaza's previously open space. Initially, GSA took the position that critics should give the work time to gain public acceptance. However, when hostility to the work had not abated after several years, GSA agreed to hold a hearing on the possible relocation of the sculpture.

A public hearing was held in March 1985, presided over by William A. Diamond, GSA Regional Administrator. More than 150 persons spoke at the hearing, representing a wide range of constituencies including artists, civic leaders, employees at the Federal Plaza complex, and community residents. In addition, Serra was given the opportunity to state his views on the site-specific nature of "Tilted Arc" and the need to keep it at Federal Plaza. Those urging removal tended to be federal employees and area residents who complained primarily of the obstruction of Federal Plaza and the sculpture's unappealing aesthetic qualities. Those against removal tended to be artists and others from the art world who pointed to the work's significance in 20th Century sculpture and the importance of protecting the artist's freedom of expression.

Following the hearing, Diamond prepared a report in which he recommended to Dwight Ink, Acting Administrator of GSA, that "Tilted Arc" be relocated. Diamond urged primarily that the sculpture obstructed Federal Plaza, preventing the public from using the space for recreation and community events. Additionally, he noted concerns expressed at the hearing regarding potential safety hazards caused by the sculpture and its vulnerability to graffiti. Though Diamond included in the report his opinion that the atmosphere of the Plaza had been "turned into affrontery," he also stated that "my consideration of the issue of whether to relocate the sculpture would not be in any way based upon the arguments ***1048** of its beauty, its ugliness, or its place in art history."

Diamond's report and the entire administrative record were reviewed by Ink. Ink also met with Serra and his attorney so that Serra could personally articulate his concern about site-specificity. In a written decision issued in May 1985, Ink decided that "Tilted Arc" should be relocated. He relied largely on the views of federal employees and community residents that the sculpture interfered with their use of Federal Plaza. Like Diamond, Ink expressly avoided linking his decision to his personal evaluation of the work's artistic merit; he stated that he "made no judgment whatsoever concerning the aesthetic value of the Tilted Arc."

Serra initiated this lawsuit in December 1986. His complaint named as defendants GSA and administrators Diamond and Ink in their individual capacities. He alleged that GSA's decision to remove "Tilted Arc" violated his rights under the Free Speech Clause of the First Amendment, the Due Process Clause of the Fifth Amendment, federal trademark and copyright laws, and state law. Serra sought a declaratory judgment that his rights had been violated, an injunction against removal of the sculpture, and damages from the individual defendants in excess of $30,000,000.

The District Court issued two opinions disposing of Serra's complaint. In the first opinion, 664 F.Supp. 798, Judge Pollack dismissed Serra's claims against GSA administrators Diamond and Ink in their individual capacities on the ground of qualified immunity. Serra does not appeal that decision. In his second opinion, 667 F.Supp. 1042, the District Judge dismissed for lack of subject matter jurisdiction Serra's claims based on breach of contract, the federal trademark and copyright statutes, and state law. Judge Pollack granted summary judgment to GSA on Serra's constitutional claims on the grounds that the decision to relocate "Tilted Arc" was a content-neutral determination made to further significant government interests and that the hearing provided all the process that was due. On appeal from the judgment dismissing his suit, Serra challenges only the rejection of his free expression and due process claims.

Discussion

A. Free Expression

[1] The District Court assumed, without deciding the issue, that "Tilted Arc" is expression protected to some extent by the First Amendment. The Court reasoned that "ideas need not necessarily be spoken or written to qualify

for First Amendment protection." 667 F.Supp. at 1055. While we agree that artwork, like other non-verbal forms of expression, may under some circumstances constitute speech for First Amendment purposes, *see, e.g., Doran v. Salem Inn, Inc.,* 422 U.S. 922, 932, 95 S.Ct. 2561, 2568, 45 L.Ed.2d 648 (1975) (topless dancing); *Piarowski v. Illinois Community College,* 759 F.2d 625, 628 (7th Cir.), *cert. denied,* 474 U.S. 1007, 106 S.Ct. 528, 88 L.Ed.2d 460 (1985) (art), we believe that the First Amendment has only limited application in a case like the present one where the artistic expression belongs to the Government rather than a private individual.

[2] [3] " 'The purpose of the First Amendment is to protect private expression and nothing in the guarantee precludes the government from controlling its own expression or that of its agents.' " *Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94, 139 n. 7, 93 S.Ct. 2080, 2104 n. 7, 36 L.Ed.2d 772 (1973) (Stewart, J., concurring) (quoting T. Emerson, *The System of Freedom of Expression* 700 (1970)); *see Muir v. Alabama Educational Television Comm'n,* 688 F.2d 1033, 1044 (5th Cir.1982) (in banc) ("the First Amendment does not preclude the government from exercising editorial control over its own medium of expression"), *cert. denied,* 460 U.S. 1023, 103 S.Ct. 1274, 75 L.Ed.2d 495 (1983). Consequently, the Government may advance or restrict its own speech in a manner that would clearly be forbidden were it regulating the speech of a private citizen. *See, e.g., Wooley v. Maynard,* 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (state may ***1049** express official view of state history, but may not force individuals to do so); *Muir v. Alabama Educational Television Comm'n, supra* (state-operated public television station may cancel a scheduled program because of its content); *see also United States Civil Service Comm'n v. National Association of Letter Carriers,* 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973) (act forbidding federal employees from engaging in political activity does not violate First Amendment).

In this case, the speaker is the United States Government. "Tilted Arc" is entirely owned by the Government and is displayed on Government property. Serra relinquished his own speech rights in the sculpture when he voluntarily sold it to GSA; if he wished to retain some degree of control as to the duration and location of the display of his work, he had the opportunity to bargain for such rights in making the contract for sale of his work. Nothing GSA has done limits the right of any private citizen to say what he pleases, nor has Serra been prevented from making any sculpture or displaying those that he has not sold. Rather, the Government's action in this case is limited to an exercise of discretion with respect to the display of its own property. Though there are conceivably situations in which the Government's exercise of its discretion in this regard could violate the First Amendment rights of the public, *see Board of Education v. Pico,* 457 U.S. 853, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982), nothing GSA has done here encroaches in any way on Serra's or any other individual's right to communicate.

[4] Even assuming that Serra retains some First Amendment interest in the continued display of "Tilted Arc," we agree with the District Court that removal of the sculpture is a permissible time, place, and manner restriction.[1] Such restrictions are valid "provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Clark v. Community for Creative Non–Violence,* 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984); *see City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 804–05, 104 S.Ct. 2118, 2128, 80 L.Ed.2d 772 (1984); *United States v. O'Brien,* 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 673 (1968). Relocation of "Tilted Arc" conforms with these requirements.

1 The Government argues that its decision to remove "Tilted Arc" does not implicate the First Amendment because Federal Plaza is not a public forum. However, the cases it cites do not involve open public places like Federal Plaza. *E.g., Lehman v. City of Shaker Heights,* 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974) (municipal buses); *Perry Education Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983) (school mail facilities); *Piarowski v. Illinois Community College, supra,* 759 F.2d at 628–29 (school art gallery). Streets and public parks " 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.' " *Perry Education Ass'n v. Perry Local Educators' Ass'n, supra,* 460 U.S. at 45, 103 S.Ct. at 955 (quoting *Hague v. CIO,* 307 U.S. 496, 515, 59 S.Ct. 954, 964, 83 L.Ed.

1423 (1939)). We need not decide whether Federal Plaza is a public forum because, even in a public forum, expression is subject to reasonable time, place, and manner restrictions. *See Clark v. Community for Creative Non–Violence,* 468 U.S. 288, 293, 104 S.Ct. 3065, 3069 (1984).

GSA has a significant interest in keeping the Plaza unobstructed, an interest that may be furthered only by removing the sculpture. This interest stems from GSA's clearly established authority to maintain, operate, and alter federal buildings, including their "grounds, approaches, and appurtenances," 40 U.S.C. §§ 490, 603(a), 612(1) (1982), which in turn derives from Congress' power under the Constitution "to dispose of and make all needful Rules and Regulations respecting the ... Property belonging to the United States." Art. IV, § 3, cl. 2. In other contexts, the Government's important interest in controlling federal property has been found to prevail over individuals' First Amendment rights. *See Lyng v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988) ("Whatever ***1050** [free exercise] rights the Indians may have to the use of [the National Park], those rights do not divest the Government of its right to use what is, after all, *its* land.") (emphasis in original).

Nor does relocation of "Tilted Arc" preclude Serra from communicating his ideas in other ways. First, Serra has already had six years to convey his message through the sculpture's presence in the Plaza. Since the First Amendment protects the freedom to express one's views, not the freedom to continue speaking forever, the relocation of the sculpture after a lengthy period of initial display does not significantly impair Serra's right to free speech. Second, Serra has not shown that removal of the sculpture creates "any barrier to delivering to the media, or to the public by other means," whatever message he intended to convey with "Tilted Arc." *Clark v. Community for Creative Non–Violence, supra,* 468 U.S. at 295, 104 S.Ct. at 3070. Notwithstanding that the sculpture is site-specific and may lose its artistic value if relocated, Serra is free to express his artistic and political views through the press and through other means that do not entail obstructing the Plaza. *See id.* (demonstrators may not sleep in public park to protest plight of homeless).

Finally, the decision to remove "Tilted Arc" was not impermissibly content-based. According to the reports of GSA administrators Diamond and Ink, the primary reason for removal was the fact that the sculpture interfered with the public's use of Federal Plaza. Additionally, GSA was concerned about public safety and graffiti. Both Diamond and Ink expressly represented that they had not based their decisions on the work's artistic merit or its message. We agree with the District Court's assessment that "[t]here is no evidence in the record that GSA's decision to relocate the sculpture was based on the content of its message.... GSA's decision to relocate the structure was undertaken for functional purposes—in order to regain the openness of the plaza." 667 F.Supp. at 1056 (footnote omitted).

Serra argues that the GSA administrators' reports were disingenuous. Relying on *Board of Education v. Pico, supra,* Serra contends that he is entitled to a trial to determine whether in fact the removal was impermissibly content-based. We reject Serra's claim because he does not assert any facts that could possibly constitute a constitutional violation. In *Pico,* a plurality of the Supreme Court determined that a local school board could not remove books from the school library in order to deny the students access to ideas with which the board disagreed. 457 U.S. at 871, 102 S.Ct. at 2810. Recognizing that school officials enjoy significant discretion to determine the content of school libraries, the plurality said only that such discretion "may not be exercised in a narrowly partisan or political manner," for example if a Democratic school board sought to ban all books by Republicans, or an all-White school board decided to remove all books authored by Blacks. *Id.* at 870–71, 102 S.Ct. at 2809–10. The plurality left completely intact the board's discretion to remove books for other reasons. Thus, removal of books that were pervasively vulgar or educationally unsuitable would, even in the plurality's view, be "perfectly permissible." *Id.* at 871, 102 S.Ct. at 2810.

[5] We recognize that this case poses at least the potential for a *Pico*-type First Amendment violation. Even where, as here, the removal of an artwork does not restrict the artist's free speech because the work is owned by the Government, it is still possible that the Government's broad discretion to dispose of its property could be exercised in an impermissibly repressive partisan or political manner. Nevertheless, even if we assume, without deciding, that Serra has standing to assert a *Pico*-type claim, it is clear that under any reading of the record in this case, the removal of "Tilted Arc" did not violate the

principles of *Pico.* At the very most, Serra suggests that Diamond and Ink thought that "Tilted Arc" was ugly. That is surely an assessment of the work's content, but it raises no issue under *Pico* since there is no assertion of facts to indicate that GSA officials understood the sculpture to be expressing ***1051** any particular idea, much less that they sought to remove the sculpture to restrict such expression or convey their own disapproval of the sculptor's message. Indeed, Serra is unable to identify any particular message conveyed by "Tilted Arc" that he believes may have led to its removal. In view of the uncertainty as to the meaning of "Tilted Arc" and in the face of the overwhelming evidence that it was removed solely because of its obstructive effect on the Plaza, Serra has failed to present any facts to support a claim that Government officials acted in a "narrowly partisan or political manner."

[6] To the extent that GSA's decision may have been motivated by the sculpture's lack of aesthetic appeal, the decision was entirely permissible. As stated above, *Pico* held that books could be removed from the school library if they were vulgar or educationally unsuitable. Similarly, GSA, which is charged with providing office space for federal employees, may remove from its buildings artworks that it decides are aesthetically unsuitable for particular locations. Moreover, the Supreme Court has consistently recognized that consideration of aesthetics is a legitimate government function that does not render a decision to restrict expression impermissibly content-based. *See, e.g., City Council v. Taxpayers For Vincent, supra,* 466 U.S. at 805–07, 104 S.Ct. at 2128–30; *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 507–08, 101 S.Ct. 2882, 2892–93, 69 L.Ed.2d 800 (1981); *Kovacs v. Cooper,* 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949). Finally, several courts have held that the state may regulate the display and location of art based on its aesthetic qualities and suitability for the viewing public without running afoul of First Amendment concerns. *See Piarowski v. Illinois Community College, supra,* 759 F.2d at 630–32; *Close v. Lederle,* 424 F.2d 988 (1st Cir.), *cert. denied,* 400 U.S. 903, 91 S.Ct. 141, 27 L.Ed.2d 140 (1970).

We recognize that courts considering First Amendment challenges by artists to governmental decisions to remove purchased works of art must proceed with some caution, lest a removal ostensibly based on unsuitable physical characteristics of the work or an unfavorable assessment of its aesthetic appeal camouflage an impermissible condemnation of political viewpoint. At the same time, artists must recognize that overly intrusive judicial restraints upon the prerogatives of government to decide when, where, and whether to display works of art that it has purchased would pose a serious threat to the vigor of such commendable ventures as GSA's art-in-architecture program. Government can be a significant patron of the arts. Its incentive to fulfill that role must not be dampened by unwarranted restrictions on its freedom to decide what to do with art it has purchased. *Cf. Advocates for the Arts v. Thomson,* 532 F.2d 792, 796–97 (1st Cir.) (emphasizing broad discretion in allocating public funding for the arts), *cert. denied,* 429 U.S. 894, 97 S.Ct. 254, 50 L.Ed.2d 177 (1976). If Serra had presented any facts to create a genuine issue as to whether GSA was removing "Tilted Arc" to condemn a political point of view or otherwise to trench upon First Amendment rights, we would require a trial, just as we did in *Pico. Pico v. Board of Education,* 638 F.2d 404 (2d Cir.1980), *aff'd,* 457 U.S. 853, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982). But he has not done so. In the absence of such facts, his lawsuit is really an invitation to the courts to announce a new rule, without any basis in First Amendment law, that an artist retains a constitutional right to have permanently displayed at the intended site a work of art that he has sold to a government agency. Neither the values of the First Amendment nor the cause of public art would be served by accepting that invitation.

B. Due Process

[7] Serra claims that he was denied due process because GSA administrator Diamond "prejudged" the issue of whether "Tilted Arc" should be removed. Serra claims that Diamond had decided that he was opposed to the sculpture even before the public hearing had begun. In support of this argument, Serra points to statements ***1052** Diamond made to the press before and during the hearing indicating that he was against retaining "Tilted Arc" at Federal Plaza. Additionally, Serra suggests that Diamond may have stirred up opposition to the sculpture among federal employees and community residents. Serra argues that Diamond's conduct violated his right to a fair and impartial hearing on the removal issue.

Accepting Serra's factual allegations as true for purposes of this appeal, we conclude that his due process claim fails as a matter of law. First, Serra has no protected property interest in the continued display of "Tilted Arc" at Federal Plaza. Pursuant to Serra's contract, the sculpture is the property of GSA, not the artist. Moreover,

though Serra might suffer injury to his reputation as a result of relocation of the sculpture, such an injury without an accompanying loss of government employment would not constitute a constitutionally cognizable deprivation of property or liberty. *Paul v. Davis,* 424 U.S. 693, 701–10, 96 S.Ct. 1155, 1160–65, 47 L.Ed.2d 405 (1976). And without a protected property or liberty interest, Serra was not constitutionally entitled to a hearing before the sculpture could be removed. The lengthy and comprehensive hearing that was provided was therefore a gratuitous benefit to Serra. Even if Diamond was not entirely impartial, Serra received more process than what was due. Second, there is no allegation that Ink was biased or in any way prejudged the removal issue. Since Ink undertook a *de novo* review of the entire controversy, the effect of Diamond's prejudgment, if any, was marginal. Particularly since Serra was given the opportunity to defend his position at length before both Diamond and Ink, any due process requirement that might have arisen in the context of this case was clearly satisfied.

The judgment of the District Court is affirmed.

All Citations

847 F.2d 1045, 93 A.L.R. Fed. 897

836 F.Supp. 1219
United States District Court,
E.D. North Carolina,
Raleigh Division.
.

Dayton CLAUDIO, Plaintiff,
v.
UNITED STATES of America; United States General Services Administration; Steven S. Grant, individually and in his capacity as Field Office Manager for the General Services Administration in Raleigh; and David H. Jameson, individually and in his capacity as Regional Director—Buildings Management Division for the General Services Administration, Defendants.

No. 92–495–CIV–5–F.
|
Feb. 2, 1993.

Synopsis

Painter brought action against government, General Services Administration (GSA) and GSA officials, alleging that his constitutional rights were violated when permit to display painting in federal building lobby was revoked. GSA officials filed motion for partial summary judgment on basis of qualified immunity. The District Court, James C. Fox, Chief Judge, held that officials were entitled to qualified immunity from painter's claims.

Motion allowed.

West Headnotes (4)

[1] **Public Employment**
Actions

316P Public Employment
316PXI Liabilities
316PXI(E) Actions
316Pk981 In general
(Formerly 283k119 Officers and Public Employees)

Issue of qualified immunity should be resolved at earliest possible stage of litigation, to avoid substantial social costs of subjecting officials to litigation over their discretionary conduct, including distracting them from their duties, inhibiting their action, and deterring able people from public service.

Cases that cite this headnote

[2] **Public Employment**
Particular torts
United States
Privilege or immunity;good faith

316P Public Employment
316PXI Liabilities
316PXI(B) Particular Cases and Contexts
316PXI(B)2 Privilege or Immunity;Good Faith
316Pk934 Particular torts
(Formerly 393k50.10(1))
393 United States
393V Employees, Officers, and Agents
393V(D) Liabilities
393V(D)1 In General
393k1414 Particular Cases and Contexts
393k1417 Particular Torts
393k1417(2) Privilege or immunity;good faith
(Formerly 393k50.10(1))

Conduct of General Services Administration (GSA) officials in issuing, then revoking, revocable permit to display painting in lobby of federal building represented discretionary acts for which qualified immunity was available; although regulations set forth instances which required denial or revocation of permits, officials had to exercise judgment and discretion in determining whether and how regulations applied to peculiar fact situation with which they were confronted. Federal Property and Administrative Services Act of 1949, § 210, as amended, 40 U.S.C.A. § 490; Public Buildings Act of 1959, §§ 7, 12, 40 U.S.C.A. §§ 606, 611; Public Buildings Cooperative Use Act of 1976, §§ 102, 105, 40 U.S.C.A. §§ 601a, 612a.

1 Cases that cite this headnote

[3] **Constitutional Law**
Courthouses and courtrooms

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1768 Courthouses and courtrooms
(Formerly 92k90.1(4))

For First Amendment purposes, main entrance lobby of federal building was not traditional public forum, but rather was nonpublic forum that was dedicated to use for either communicative or noncommunicative purposes, but was never designated for indiscriminate expressive activity by general public, considering nature of building as one housing judges' chambers, courtrooms, and federal agencies, lobby's minimal compatibility with expressive activity due to its size and need for security, and limited use granted. U.S.C.A. Const.Amend. 1.

6 Cases that cite this headnote

[4] United States
Particular actors and situations in general

393 United States
393V Employees, Officers, and Agents
393V(D) Liabilities
393V(D)2 Constitutional Violations;Bivens Claims
393k1469 Privilege or Immunity;Good Faith
393k1473 Particular actors and situations in general
(Formerly 393k50.10(1))

General Services Administration (GSA) officials were entitled to qualified immunity from free speech, equal protection, and due process claims arising from the revocation of revocable permit to display, in lobby of federal building, large painting depicting nude woman, three dimensional portrayal of human fetus, and wire coat hanger that was bent and appeared to be dripping blood; because officials could not determine position that painting was taking on abortion, decision to revoke could not have been motivated by intent to suppress painter's viewpoint on that controversial subject. U.S.C.A. Const.Amends. 1, 5.

Cases that cite this headnote

Attorneys and Law Firms

***1220** William G. Simpson, Jr., N.C. Civil Liberties Union Legal Foundation, William D. Dannelly, Deborah K. Ross, Hunton & Williams, Raleigh, NC, for plaintiff.

Theodore Hirt, U.S. Dept. of Justice, Civil Div., W. Scott Simpson, U.S. Dept. of Justice Federal Programs Branch Civil Div., Washington, DC, for defendants.

Opinion

ORDER

JAMES C. FOX, Chief Judge.

This matter is before the court on motion by defendants, Steven S. Grant (Grant) and David H. Jameson (Jameson) for partial judgment on the pleadings or, in the alternative, for partial summary judgment. The court already has ruled on defendants' contention that they were not effectively served with process in their individual capacities; the issue now before the court is whether defendants are entitled to qualified immunity from this suit. Plaintiff has responded, and a reply has been filed. The matter is ripe for disposition.

STATEMENT OF THE CASE

Plaintiff claims that the United States Constitution requires that he be permitted to display a painting entitled "Sex, Laws & Coathangers" in the main entrance lobby of the federal building in Raleigh, North Carolina. He has sued the United States, the General Services Administration (GSA), and two GSA officials in their individual and official capacities. Plaintiff seeks declarative and injunctive relief, as well as damages against the individual defendants. Both parties have submitted affidavits in support of their respective positions on the instant motion.

STATEMENT OF THE FACTS

In March, 1992, plaintiff, a resident of California, applied through the GSA in Raleigh for a license to display a painting in the main entrance lobby of the federal building/post office/courthouse at 310 New Bern Avenue, Raleigh, North Carolina. Plaintiff's application was made pursuant to the Public Buildings Cooperative Use Act, 40 U.S.C. §§ 490, 601a, 606, 611, 612a (the Act), which authorizes the Administrator of the GSA:

> to make available, on occasion, or to lease at such rates and on such other terms and conditions as the Administrator deems to be in the public interest, auditoriums, meeting rooms, courtyards, rooftops, and ***1221** lobbies of public buildings to persons, firms, or organizations engaged in cultural, educational, or recreational activities ... that will not disrupt the operation of the building.

Id. at § 490(a)(17). The Act defines "cultural activities" to include "film, dramatic, dance and musical presentations, and fine art exhibits ...," *id.* at § 612a(6), and is intended to "encourage the public use of public buildings for cultural, educational, and recreational activities," *see id.* at § 601a(a)(4).

The regulations promulgated under the Act allow "[a]ny person or organization desiring to use a public area" to apply for a permit with the local GSA buildings manager. 41 C.F.R. § 101–20.401(a). The application must contain the following information:

> (1) Full names, mailing addresses, and telephone numbers of the applicant, the organization sponoring [sic] the proposed activity, and the individual(s) responsible for supervising the activity;
>
> (2) Documentation showing that the applicant has authority to represent the sponsoring organization;
>
> (3) A description of the proposed activity, including the dates and times during which it is to be conducted and the number of persons to be involved.

Id. at § 101–20.401(b). GSA must issue a permit within ten working days of the application if approved; the permit is not to be issued for a period in excess of thirty days without specific approval. *Id.* at § 101–20.402(a).

The regulations provide that a permit may be disapproved or cancelled if:

> (1) The applicant has failed to submit all information required ... or has falsified such information;
>
> (2) The proposed use is a commercial activity....;
>
> (3) The proposed use interferes with access to the public area, disrupts official Government business, interferes with approved uses of the property by tenants or by the public, or damages any property;
>
> (4) The proposed use is intended to influence or impede any pending judicial proceeding;
>
> (5) The proposed use is obscene within the meaning of obscenity as defined in 18 U.S.C. 1461–65; or
>
> (6) The proposed use is violative of the prohibition against political solicitations....

Id. at § 101–20.403(a). The regulations further provide for a written appeal to the GSA regional officer, from the disapproval of an application or the cancellation of a permit. *Id.* at § 101–20.404(a). The regional officer is to render a decision on the appeal within ten days. *Id.* at § 101–20.404(c).

In the instant case, the plaintiff obtained a permit from defendant Grant for the period May 4–29, 1992. There is no suggestion that the application plaintiff was required to submit requested a description of the subject-matter or content of the artwork. The permit does not contain the title of the painting.

The federal building in Raleigh houses four federal courtrooms, the chambers of two United States District Judges and one United States Magistrate Judge, the main offices of the Clerk of the United States District Court for the Eastern District of North Carolina, the United States Attorney's Office, the United States Marshal's Office, a Postal Service sorting facility, and numerous other federal offices. The building is secured; its doors are guarded and all who enter without Government identification must permit their belongings to pass through an X-ray machine for examination and they must walk through a magnetometer.

On the morning of May 4, 1992, the plaintiff conferred with Grant about the location for his painting and chose the east wall of the main entrance lobby from among several locations offered by Grant. According to Grant's declaration, the X-ray machine is situated approximately six feet from the wall on which plaintiff mounted his painting. The entrance lobby is approximately 27.8 feet by 18.8 feet, most of which is occupied by the x-ray machine, the magnetometer, security partitions and various small items of furniture. Until this incident, the lobby never had been used for the display of art under the Act.

***1222** Following approximately an hour of preparation, plaintiff unveiled his painting entitled "Sex, Laws & Coathangers" for a group of five to seven onlookers, including plaintiff's lawyer and a photographer from the Raleigh News & Observer newspaper. According to Grant, who also was present, and uncontradicted by the plaintiff, the work bears a painting of a nude female and, attached to the canvas, a three-dimensional representation of a human fetus and a metal wire coathanger. The curved end of the coathanger is partially straightened, and the coathanger appears to be dripping blood. The work measures approximately ten feet long by seven feet high.

Almost immediately upon the unveiling, Grant verbally revoked plaintiff's license, then asked plaintiff to accompany him to his office so that he might draft a written notice of revocation. The written notice states, inter alia, that

> [a]lthough your display may be in the form of art [,] it is more properly described as a political expression concerning the highly controversial issue of abortion.
>
> Since your work is considered to be political in nature it is not permitted on federal property and your license is hereby revoked.

As Grant's secretary handed him the typed notice, the Chief Deputy United States Marshal responsible for building security entered Grant's office and informed Grant that the presence of plaintiff's work was interfering with his ability to maintain security in the lobby. Grant states in his declaration that "he [the Chief Deputy] told me in very clear terms that if I did not remove the work, he would have to have it taken down." Grant directed his assistants to remove the work within an hour of its unveiling, and delivered the written notice of revocation to plaintiff.

Plaintiff duly appealed the revocation of his revocable license through his attorneys, to defendant David H. Jameson, Director of the Real Property Management and Safety Division in GSA's Region Four. Jameson affirmed the revocation both because "the U.S. Courts in the building are part of the judicial system now hearing cases specifically on [the] subject [of abortion]," and because "the exhibition interfered with security in the building and could cause disruption and damage to Government property." Plaintiff did not seek further review of the decision by Jameson's supervisor, but, rather, filed this lawsuit on July 23, 1992.

Plaintiff describes the rights he asserts against the individual defendants in their individual capacities as follows:

> (i) the First Amendment right to exhibit art work with a controversial and political theme in a designated public forum; (ii) the Fifth Amendment equal protection right not to have access to the forum denied to him based on the content or the viewpoint of his work; (iii) the Fifth Amendment due process right to be informed of and have the opportunity to address all potential reasons for the revocation of his permit through the governmentally mandated appeals process that will stand as final agency action with respect to the determination of his right to display his painting.

Plaintiff's Memorandum in Opposition to Defendants' Motion for Partial Judgment on the Pleadings, or, in the Alternative, for Partial Summary Judgment, at 17.

Defendants Grant and Jameson contend that they are entitled to qualified immunity from suit in their individual capacities, and it is this contention which is now before the court.

ANALYSIS

Government officials performing discretionary functions are entitled to qualified immunity when their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). Under the *Harlow* standard for government officials to be held individually liable for official discretionary conduct, "in the light of pre-existing law[,] the unlawfulness [of the challenged conduct] must be apparent." *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). If there is a "legitimate question" as to whether the challenged conduct ***1223** violated the Constitution, then no "clearly established" right has been violated. *Mitchell v. Forsyth,* 472 U.S. 511, 535 n. 12, 105 S.Ct. 2806, 2820 n. 12, 86 L.Ed.2d 411 (1985). Moreover, even if the asserted right is "clearly established," the qualified immunity defense still protects the official if "he neither knew nor should have known of the relevant legal standard." *Harlow,* 457 U.S. at 819, 102 S.Ct. at 2738.

[1] The issue of qualified immunity should be resolved at the earliest possible stage of litigation. *Anderson,* 483 U.S. at 646 n. 6, 107 S.Ct. at 3042 n. 6. Expeditious resolution of immunity issues avoids the "substantial social costs" of subjecting officials to litigation over their discretionary conduct, including distracting them from their duties, inhibiting their action, and deterring able people from public service. *Id.* at 638, 107 S.Ct. at 3038; *Harlow,* 457 U.S. at 814, 102 S.Ct. at 2736. Hence, the qualified immunity of public officials "is an *immunity from suit* rather than a mere defense to liability." *Mitchell,* 472 U.S. at 526, 105 S.Ct. at 2815 (emphasis in original). It is suggested that discovery not be allowed until immunity issues are resolved, for "avoidance of disruptive discovery is one of the very purposes for the official immunity doctrine." *Siegert v. Gilley,* 500 U.S. 226, ——, 111 S.Ct. 1789, 1795, 114 L.Ed.2d 277 (1991); *Harlow,* 457 U.S. at 818, 102 S.Ct. at 2738.

I. *PRELIMINARY ISSUES*

In ruling on a defendant's claim of qualified immunity in this context, the court must address two preliminary issues. The court first must ascertain that the challenged conduct occurred in the exercise of a discretionary, rather than in a ministerial, official function. The court also must determine the nature of the forum in which the alleged Constitutional violation occurred. Here, the forum in question is the main entrance lobby of the Raleigh, North Carolina, federal building/post office/courthouse.

A. *Discretionary Function*

[2] Although plaintiff suggests that Grant's and Jameson's acts in question were not discretionary, the court agrees with the defendants that Grant's issuing, then revoking, the revocable permit, and Jameson's affirming the revocation were discretionary. For purposes of the qualified immunity of government officials, a "discretionary" function is one that entails the exercise of at least a modicum of judgment. *See Harlow,* 457 U.S. at 816, 102 S.Ct. at 2737. "A law [or regulation] that fails to specify the *precise* action that the official must take in *each* instance creates only discretionary authority." *Davis v. Scherer,* 468 U.S. 183, 196–97 n. 14, 104 S.Ct. 3012, 3020–21 n. 14, 82 L.Ed.2d 139 (1984) (emphasis added).

Although the regulations set forth instances which require denial or revocation of a permit under the Act, the individual government official must exercise judgment and discretion in determining whether and how the regulations apply to the peculiar fact situation with which he is confronted. The court concludes that the undisputed facts herein define discretionary conduct for qualified immunity purposes.

B. *Nature of Forum*

The Constitution does not require the government to "grant access to all who wish to exercise their right to free speech on every type of government property...." *Cornelius v. NAACP Legal Defense & Educational Fund,* 473 U.S. 788, 799–800, 105 S.Ct. 3439, 3447, 87 L.Ed.2d 567 (1984). Moreover, the government has the right "no less than a private owner of property, ... to preserve the property under its control for the use to which it is lawfully dedicated." *Perry Education Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 46, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983) (citations omitted). The extent to which the government can exercise such control, however, depends upon "the nature of the relevant forum." *Cornelius,* 473 U.S. at 800, 105 S.Ct. at 3448. Only when the "government opens facilities not generally available to the public that legal questions relating to

equal access arise." *Gregoire v. Centennial School Dist.,* 907 F.2d 1366, 1370 (3d Cir.), *cert. denied,* 498 U.S. 899, 111 S.Ct. 253, 112 L.Ed.2d 211 (1990).

The Supreme Court has defined three distinct types of forums. First is the "traditional public forum," such as streets and parks ***1224** which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. Committee for Industrial Organization,* 307 U.S. 496, 515, 59 S.Ct. 954, 964, 83 L.Ed. 1423 (1939). In a traditional public forum, the government may not exclude all speech, and may enforce a content-based exclusion only if it is narrowly drawn and serves a "compelling" government interest. *See Carey v. Brown,* 447 U.S. 455, 461–62, 100 S.Ct. 2286, 2290–91, 65 L.Ed.2d 263 (1980).

The second type of forum is public property which has been "opened for use by the public as a place for expressive activity." *Perry,* 460 U.S. at 45, 103 S.Ct. at 955. Regulation of this type of forum is constitutionally governed, even if the government "was not required to create the forum in the first place." *Id.* (citing *Widmar v. Vincent,* 454 U.S. 263, 268, 102 S.Ct. 269, 273, 70 L.Ed.2d 440 (1981) (university meeting facilities)). This type of forum is a "designated open public forum," *Gregoire,* 907 F.2d at 1370, and its use is subject to the same standards that apply to a traditional public forum; that is, in addition to reasonable content-neutral restrictions on the time, place and manner of First Amendment activity, the government may impose content-based prohibitions which are narrowly drawn to effectuate a compelling government interest. *Perry,* 460 U.S. at 46, 103 S.Ct. at 955.

The third distinct forum is the "non-public forum." It is a publicly-owned facility which has been "dedicated to use for either communicative or non-communicative purposes but ha[s] never been designated for indiscriminate expressive activity by the general public." *Gregoire,* 907 F.2d at 1370–71 (citing *United States Postal Service v. Council of Greenburgh Civic Associations,* 453 U.S. 114, 101 S.Ct. 2676, 69 L.Ed.2d 517 (1981)). Restrictions on First Amendment activity in non-public forums must be "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *United States v. Kokinda,* 497 U.S. 720, 730, 110 S.Ct. 3115, 3121, 111 L.Ed.2d 571 (1990) (plurality opinion); *Cornelius,* 473 U.S. at 806, 105 S.Ct. at 3451 ("[c]ontrol over access to a non-public forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are *viewpoint neutral* ") (emphasis added).

[3] There is no suggestion that the main entrance lobby to the Raleigh federal building is a "traditional public forum." The plaintiff contends that the lobby is a designated public forum, and the defendants contend it is a non-public forum.

The Supreme Court has suggested a number of factors which should be examined to ascertain the government's intent. Among those factors are (i) the policy and practice of the government; (ii) the nature of the property, *Cornelius,* 473 U.S. at 802, 105 S.Ct. at 3449; (iii) its compatibility with expressive activity; and (iv) the extent of the use granted, *see Perry,* 460 U.S. at 46–47, 103 S.Ct. at 955–956. The court should determine whether the facility is open to all or whether it has been limited by "well-defined standards tied to the nature and function of the forum." *Gregoire,* 907 F.2d at 1371.

In the instant case, the Government's **policy** concerning use of the facility in question is demonstrated by, and articulated in, the Federal Buildings Cooperative Use Act and the Federal Real Property Management Regulations. The Act and Regulations thereunder evidence an intent to provide access to the public "for the occasional use of public areas for cultural, educational and recreational activities." 41 C.F.R. § 101–20.400. According to Grant's declaration, the **practice** with regard to this particular forum—the main entrance lobby of the Raleigh federal building—has been as follows:

> the lobby is designed primarily for entering and leaving the building and will not accommodate a gathering of more than approximately ten persons without seriously impeding the flow of traffic and endangering building security and Government property. The doors of the main entrance lobby are the only entrance to the building that is open to the public and for the federal employees who work in the building.... This lobby has

> never before been ***1225** used for the display of art under the Public Buildings Cooperative Use Act.

Grant's October 23, 1992, Declaration at 3–4.

The **nature** of the property has been described above; the federal building houses federal judges' chambers, courtrooms, federal agencies, etc. The court takes judicial notice of the fact that members of the public entering the lobby would include those summoned to jury duty, lawyers and court personnel, federal law enforcement agents, victims and witnesses en route to the United States Attorney's Office, persons seeking to file civil actions in federal court, and school children on field trips to observe the federal judicial system in operation.

The **compatibility** of the federal building's lobby with expressive activity is minimal, primarily due to the fact that it is quite small, and is devoted primarily to maintaining the security of the building. It is entirely unsuitable for any expressive activity which would attract a crowd, generate noise, or incite disruptive behavior, as any of these factors would seriously interfere with maintenance of security in the building. Moreover, the court perceives a legitimate interest by the Government in preserving a certain elevated level of decorum within (and upon) the walls of a building which houses federal judicial, executive, and administrative offices. Not every manner of expression is compatible with the ambiance of a government building.

The **"extent of use granted"** factor in the instant case is difficult to analyze. Never before had a permit been requested or granted to display "art work" in the main entrance lobby to the federal building. The permit called for the display to remain from May 4–29, 1992, and was accessible during working hours from 7:30 a.m. until 5:30 p.m. Because plaintiff applied for the permit pursuant to the Act, and it was under the Act that the permit was granted, the use was limited, *at least,* to an extent not inconsistent with the restrictions set forth in 41 C.F.R. § 101–20.403(a). [1]

[1] *See supra* p. 1221.

Because defendants made no advance inquiry as to the subject-matter of the painting, there was no occasion prior to the unveiling for defendants to perceive a need to consider additional specific restrictions. In short, the extent of use granted appears to have been relatively unrestricted because defendants were unaware of the nature of the "art work."

Careful consideration of the foregoing factors, as well as the parties' arguments and the court's personal experience with the forum in question, leads to the conclusion that the main entrance lobby of the Raleigh, North Carolina, federal building/post office/courthouse is a **non-public forum,** which has been "dedicated to use for either communicative or non-communicative purposes but ha[s] never been designated for indiscriminate expressive activity by the general public." *Gregoire,* 907 F.2d at 1370–71 (citing *Greenburgh,* 453 U.S. 114, 101 S.Ct. 2676, 69 L.Ed.2d 517 (1981)).

In summary, the court concludes that the individual defendants were acting in a discretionary capacity with regard to a non-public forum. The Supreme Court has determined that in such a forum, "[c]ontrol over access ... can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum *and* are *viewpoint neutral.*" *Cornelius,* 473 U.S. at 806, 105 S.Ct. at 3451 (emphasis added).

II. *QUALIFIED IMMUNITY*

[4] Because the individual defendants have claimed qualified immunity from suit, the court now must determine whether, in performing the discretionary functions which are at issue in this action, they engaged in conduct that violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow,* 457 U.S. at 818, 102 S.Ct. at 2738. In addressing the *Harlow* test, the court finds Judge Phillips' concurring opinion most instructive in *Collinson v. Gott,* 895 F.2d 994 (4th Cir.1990) (per curiam), and will refer extensively to it.

Judge Phillips advises that three inquiries are necessary in analyzing a claim of qualified immunity. First, the court must "identify ***1226** the specific constitutional right allegedly violated." *Id.* at 998. Next, the court should inquire whether at the time of the alleged violation that right was clearly established. *Id.* These first two questions present pure questions of law for the court. *Id.* (citing *Anderson v. Creighton,* 483 U.S. 635, 107 S.Ct. 3034,

97 L.Ed.2d 523 (1987)). Finally, a determination must be made whether a reasonable person in the official's position would have known that his conduct would violate that specific constitutional right. *Id.* This final inquiry requires application of the objective *Harlow* test, but sometimes may require factual determinations regarding a defendant's conduct and its circumstances in order for the court to apply the *Harlow* test as a matter of law. *Id.*

A. *Specific Constitutional Rights*

In applying the *Harlow* test, the focus here is "not upon the right at its most general or abstract level, but upon its application to the particular conduct being challenged." *Collinson,* 895 F.2d at 998. The general Constitutional rights allegedly violated are the First Amendment right to free speech, and the Fifth Amendment rights to equal protection and due process. The court perceives the alleged specific "rights" in question here to be:

(i) the First Amendment "right" to exhibit a ten foot by seven foot painting, entitled "Sex, Laws & Coathangers," depicting a nude woman, a three dimensional portrayal of a human fetus and a wire coathanger whose bent end appears to be dripping blood, in the main entrance lobby of a federal building/post office/courthouse—a non-public forum;

(ii) the Fifth Amendment equal protection "right" not to have a permit to display such a painting in a non-public forum denied on the basis of the painting's content or viewpoint; and

(iii) the Fifth Amendment due process "right" to prior notice and opportunity for hearing, and a "final" administrative decision upon which to base an appeal, with regard to a Government official's discretionary decision to revoke a permit to display such a painting.

Having thus identified the specific conduct which plaintiff contends violated certain of his constitutional rights, the next inquiry is whether, on May 4, 1992, those alleged specific constitutional rights were "clearly established."

B. *Rights Clearly Established*

The First and Fifth Amendment rights to free speech, due process and equal protection certainly are clearly established. However, for purposes of qualified immunity analysis, the court must determine whether the specific application of those rights in the context of the peculiar facts confronting the Government officials at the relevant time should have been apparent.

In tackling this inquiry in the context of a County Commissioner refusing a citizen the opportunity fully to express himself at a public meeting, Judge Phillips in *Collinson* noted that "it would appear that no federal court up to that time had ever directly held that such an *ad hoc* parliamentary ruling could or had violated a speaker's first amendment speech rights." *Collinson,* 895 F.2d at 999 (footnote omitted). He went on to observe, however, that absence of precedent "alone does not establish entitlement to qualified immunity here, but it surely bears heavily on whether the unlawfulness of the conduct challenged here—if it be unlawful—should have been apparent to a reasonable official in [defendant's] position."

Disregarding for the moment the exigency Grant obviously perceived upon the unveiling, had he been afforded the luxury of consulting with counsel who, in turn, had the time, expertise and resources to expend on a thorough legal research expedition, he would have learned that there appear to be few reported cases whose facts closely resemble this one. Three of the most similar on their facts, reach divergent results.

Chronologically, the first of these is *Sefick v. City of Chicago,* 485 F.Supp. 644 (N.D.Ill.1979). In *Sefick,* an artist (who happened also to be a federal probation and parole officer) obtained permission to display three different tableaus at the Richard J. Daley Civic Center. The tableaus comprised sculpted figures, and tape recordings which conveyed social or political messages. The ***1227** artist described the tableau scheduled for the third week as a "Chicago portrayal of Grant Woods' famous painting American Gothic in plaster. The life-sized figures are contemporaries of Chicago society. Husband, wife and child make up the setting." *Id.* at 646. The tableau, in fact, "satirized the handling by then-mayor Michael Bilandic of the snow removal operation necessitated by the record snowfall ... during the winter of 1979." *Id.*

Ms. Farina of the Chicago Council on Fine Arts, who issued the permit to display the tableaus, contacted the artist upon viewing this third exhibit, and asked him to remove it; she then covered it with a blanket. The City's position was that the permit was revoked due to variance of the actual work with the prior description, although Ms. Farina admitted that she found the tableau inappropriate because it singled out identifiable individuals for ridicule. *Id.* at 650 n. 17. The plaintiff, of course, contended that "the artistic expression of social and political views is protected speech under the first amendment." *Id.* at 648.

The court found that the Civic Center was a designated public forum, that there had been no prior expression of concern that the first two tableaus might be perceived as representing official city viewpoint, and that the defendants revoked the permit because of their objection to the social and political nature of the third tableau. Hence, the court granted injunctive relief to the plaintiff and against the City.

In 1988, the Second Circuit Court of Appeals was confronted with a situation in which a sculptor had sued the GSA for removing a "site-specific" sculpture GSA had commissioned him to create. *Serra v. United States General Services Administration,* 847 F.2d 1045 (2d Cir.1988). The 12 foot tall, 120 foot long steel structure was installed in the center of Federal Plaza in lower Manhattan, New York. Almost immediately upon its installation, the public complaints began. Objections included the sculpture's unappealing aesthetic qualities as well as the physical obstruction it presented to pedestrian federal employees and area residents.

GSA conducted a hearing after which it recommended that the sculpture be relocated. The artist and his counsel were afforded an opportunity to voice their concerns. GSA rendered a decision to relocate the sculpture, because it interfered with the public's use of the Federal Plaza. The GSA administrators were dismissed from the suit in their individual capacities on ground of qualified immunity.

In upholding summary judgment against Serra's Constitutional claims, the Appeals Court pointed to "GSA's clearly established authority to maintain, operate, and alter federal buildings...., which in turn derives from Congress' power under the Constitution 'to dispose of and make all needful Rules and Regulations respecting the ... Property belonging to the United States.' " *Id.* at 1049 (citations omitted). The court also noted that the artist was unable to identify any particular message conveyed by his sculpture which he believes led to its removal. *Id.* at 1051. Finally, with regard to the First Amendment claim, the court flatly stated that:

> GSA, which is charged with providing office space for federal employees, may remove from its buildings artworks that it decides are aesthetically unsuitable for particular locations. Moreover, the Supreme Court has consistently recognized that consideration of *aesthetics is a legitimate government function that does not render a decision to restrict expression impermissibly content-based.*

Id. (emphasis added) (citations omitted). Thus, the *Serra* court found no unconstitutional conduct by GSA in removing the "artwork" for reasons of aesthetics and convenience.

Finally, there is *Amato v. Wilentz,* 753 F.Supp. 543 (D.N.J.1990), *vacated on other grounds,* 952 F.2d 742 (3d Cir.1991), in which the district court had found First Amendment violations in the state Supreme Court Chief Justice's order forbidding the Essex County Courthouse from being used as the site for filming a scene for the movie, "Bonfire of the Vanities," in which African American spectators were depicted engaging in riotous behavior in a courtroom. The Chief Justice had stated concern for the judiciary's ***1228** need to "avoid further eroding ... the confidence of blacks and other minorities in the judicial system." *Id.* at 557.

Partly because the Essex County Courthouse previously had been used in filming numerous diverse motion pictures, the district court determined that the courthouse was a designated public forum. It found the Chief Justice's motivation to be "nothing more than an attempt to bolster the reputation of the Court by infringing upon the constitutional rights of others," and that a simple disclaimer would have constituted a far narrower means to protect the interest, if any, in a correlation between the judiciary and the black communities' perception of judicial insensitivity. *Id.* at 558.

Most importantly, however, was the district court's distinction between suppression of **content** and suppression of **viewpoint,** and its observation that the Chief Justice failed to recognize such distinction. As Judge Phillips aptly put it in *Collinson,* "[t]he limits [of official discretion] can be found in the well-established principle that the primary concern of the no-censorship-of-content requirement is with speaker viewpoint rather than with subject matter *per se.*" *Collinson,* 895 F.2d at 1000. That is, reasonable content-based restrictions are permissible so long as the actual purpose is not to prevent expression of a particular viewpoint.

The district court in *Amato* concluded that, although the unconstitutionality of viewpoint discrimination is well established, [2] it was *not* well established that the "principle would apply to the unique facts of this case." *Amato,* 753 F.Supp. at 562. The court explained that

2 Judge Phillips also had concluded in his concurring opinion that "the general contours of the first amendment right in this specific context ... must be considered to have been well-established at the critical time...." *Collinson,* 895 F.2d at 1000.

> [t]here are simply too many grey areas, both procedural and substantive, for this court to conclude that the Chief Justice's action violated "clearly established" law. This defendant acted in uncharted constitutional waters and is thus entitled to be protected by the principles of qualified immunity.
>
> *Id.* at 562. [3]

3 Without addressing any substantive issues, the Third Circuit Court of Appeals vacated the district court's order solely on standing grounds. *Amato v. Wilentz,* 952 F.2d 742 (3d Cir.1991).

Thus, had the Government officials in the instant case had the advantage of researching the particular legal issue presented here, they presumably would have discovered a case finding a First Amendment violation and issuing an injunction (*Sefick*), a case finding no First Amendment violation (*Serra*), a case finding a First Amendment violation but finding the government official entitled to qualified immunity, then having the case vacated on other grounds (*Amato*), and a scholarly concurring opinion in a Fourth Circuit case finding the defendant entitled to qualified immunity and therefore not reaching the question whether there was a Constitutional violation (*Collinson*).

Here, as in *Amato* and *Collinson,* the court concludes that the no-censorship-of-viewpoint principle was well-established on the date in question. It further concludes that reasonably competent government officials in defendants' positions would have known that they could not constitutionally revoke the plaintiff's revocable permit if they "had no reasonable basis for fearing disruption, or if [their] actual purpose was to prevent expression of [the artist's] viewpoint on the [abortion] issue." *Collinson,* 895 F.2d at 1000.

However, these conclusions do not end the court's inquiry. As cogently expressed in Judge Phillips' opinion in *Collinson:*

> [H]ere we encounter difficult conceptual problems in applying the objective test of qualified immunity to the particular type of constitutional claim here in issue. The problems arise from the fact that the first amendment claim here turns both on [plaintiff's] subjective purpose and on the objective reasonableness of his perceptions. The difficulty this poses for application of *Harlow* 's wholly objective test can be illustrated by posing that test in terms fact-specific to this case.

***1229** *Id.* at 1001. The objective test posed in terms fact-specific to the instant case is: "Would a reasonable person in defendants' position, that is, one acting on defendants' information and knowledge and motivated by defendants' purpose, have known that to revoke plaintiff's revocable permit to display his work in the main entrance lobby of the Raleigh federal building/post office/courthouse would violate the well-established first amendment principles above identified?"

Understanding and keenly appreciating Judge Phillips' observation of the difficulty in addressing the "objective" *Harlow* inquiry when, in fact, it contains a subjective element—the defendants' purpose in doing what they did—the court must execute its duty to do so in ruling on this motion for partial summary judgment while

"keep[ing] in mind the policies that underlie qualified immunity doctrine [without] becom[ing] unduly hung up on metaphysical difficulties." *Id.* The dispositive inquiries, then, are (i) even if defendants were mistaken in thinking that the revocation was justified, was their perception nevertheless objectively reasonable under the circumstances (**objective** element of test); and (ii) were defendants motivated by a desire to censor plaintiff's viewpoint on the issue of abortion (**subjective** element of test).

Judge Phillips' thoughtful concurring opinion in *Collinson* identifies, analyzes and proposes a solution to the "serious problem" which arises when the subjective purpose of the defendants' conduct is an element of the plaintiff's claim, and the defendants have moved for summary judgment. Judge Phillips, in an effort to harmonize apparently conflicting policies[4], recognized that the "purely 'objective' [*Harlow*] test cannot in the end avoid the necessity to inquire into official motive or intent or purpose when such states of mind are essential elements of the constitutional right allegedly violated." *Id.* at 1001–02 (citations omitted). In accord with the solution adopted by the Tenth Circuit Court of Appeals in *Pueblo Neighborhood Health Centers, Inc. v. Losavio,* 847 F.2d 642, 649 (10th Cir.1988), Judge Phillips proposed as the rule for the Fourth Circuit the following approach:

4 "Vindication of immunity policies depends heavily upon the ability to dispose of insubstantial claims by resolving immunity questions at the earliest possible stages of a litigation, preferably on pleading or summary judgment motions." *Collinson,* 895 F.2d at 1001 (citing *Mitchell,* 472 U.S. at 526, 105 S.Ct. at 2815). However, because questions of subjective states of mind are notoriously ill-adapted to summary resolution, *Harlow* attempted to eliminate a "bad faith" element or inquiry into a defendant's purely subjective perceptions. *Id.*

> When a defendant's motive or intent is an element of a constitutional claim, a defendant's motion for summary judgment based upon a plausible showing of the objective reasonableness of his actions, including a proper motive or intent, may not be defeated by merely conclusory assertions of improper motive or intent, but only be pointing to specific evidence of improper motive or intent.
>
> *Collinson,* 895 F.2d at 1002. This court finds the *Pueblo* approach fair and sensible, and adopts it for analysis of the dispositive issue here.

Plaintiff points out that the defendants have offered several different explanations for their decision to revoke plaintiff's revocable permit. Grant at first allegedly stated that the work was "obscene, controversial and political." In his written notice of revocation, Grant reiterated his perception that the work was "a political expression concerning the highly controversial issue of abortion." Defendant Jameson affirmed Grant's decision, because "the exhibition interfered with security ... and could cause disruption and damage to Government property," and "the U.S. Courts in the building are part of the judicial system now hearing cases specifically on [the] subject [of abortion]." However, plaintiff has failed, as required by Rule 56(e), Fed.R.Civ.P., *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), and *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), to counter defendants' plausible showing of the objective reasonableness of their actions, including proper motives, by pointing to "specific evidence of improper motive or intent." *Collinson,* 895 F.2d at 1002.

Specifically, defendants have demonstrated that their conduct, although admittedly not content-neutral, could not have been motivated ***1230** by an intent to suppress or censor the plaintiff's *viewpoint* regarding the content. In its memorandum opposing the instant motion, plaintiff acknowledges that "defendants themselves claim that they are uncertain of the intended message in plaintiff's work." Plaintiff's December 8, 1992, Memorandum in Opposition to Defendants' Motion at 22 (citing Defendants' Memorandum at 25 n. 9 ("defendants definitely did not act out of a desire to suppress the viewpoint of plaintiff's work.... Indeed, it is not entirely clear whether the viewpoint of plaintiff's work favors or opposes laws regulating abortion")).

Of course, if defendants could not ascertain the plaintiff's viewpoint, it is impossible that they could disagree with it. The sum and substance of plaintiff's "showing" with regard to the critical subjective element is summed up in his conclusory statement that "defendants' decision with respect to plaintiff's license was made, upon information and belief, because the political message conveyed by plaintiff's art was contrary to that of the defendants." Plaintiff's Memorandum, *supra,* at 8. Such a "showing"

is insufficient to withstand defendants' motion for partial summary judgment on the issue of qualified immunity, as plaintiff "cannot rely on merely conclusory assertions of unconstitutional motive in this context." *Collinson,* 895 F.2d at 1002; *see also* Rule 56(e), Fed.R.Civ.P. Therefore, defendants' motion for partial summary judgment on the grounds of qualified immunity is ALLOWED, and Grant and Jameson are DISMISSED as defendants in their individual capacities.

SUMMARY

That the primary concern of the no-censorship-of-content requirement is with speaker viewpoint rather than with subject matter *per se,* is a "well-established principle." *Collinson,* 895 F.2d at 1000. Also well-established is the government's "weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression," *Members of City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 806, 104 S.Ct. 2118, 2129, 80 L.Ed.2d 772 (1984).

Plaintiff has failed to overcome defendants' plausible showing that Grant's and Jameson's conduct was motivated by reasonable concerns arising from the subject matter of plaintiff's exhibit, but unrelated to its viewpoint. Specifically, defendants are entitled to partial summary judgment on grounds of qualified immunity because the plaintiff has not made an adequate showing that defendants' decision to revoke plaintiff's revocable permit to display a gory and graphic painting entitled "Sex, Laws & Coathangers" in the main entrance lobby of the Raleigh, North Carolina, federal building (a non-public forum) was motivated by an intent to suppress plaintiff's viewpoint on the admittedly controversial subject matter of the painting.

Plaintiff has acknowledged that defendants could not determine whether the painting was "for" or "against" the subject depicted—abortion. Because plaintiff admits that the defendants could not perceive the painting's viewpoint, it is impossible for plaintiff to demonstrate that they disagreed with it and acted out of a motivation to suppress it. Defendants' motion for partial summary judgment is ALLOWED on grounds of qualified immunity.

SO ORDERED.

All Citations

836 F.Supp. 1219

KeyCite Yellow Flag - Negative Treatment
Distinguished by United States v. Davis, W.D.Tenn., December 5, 2016

128 S.Ct. 1830
Supreme Court of the United States

UNITED STATES, Petitioner,
v.
Michael WILLIAMS.

No. 06–694.
|
Argued Oct. 30, 2007.
|
Decided May 19, 2008.

Synopsis

Background: Defendant was convicted in the United States District Court for the Southern District of Florida, No. 04-20299-CR-DMM, of promotion of child pornography and possession of child pornography, and he appealed. The United States Court of Appeals for the Eleventh Circuit, 444 F.3d 1286,reversed promotion of child pornography conviction and vacated sentence thereon, finding the statute both overbroad under First Amendment and impermissibly vague under Due Process Clause. Certiorari was granted.

Holdings: The Supreme Court, Justice Scalia, held that:

[1] Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act provision criminalizing the pandering or solicitation of child pornography is not overbroad under the First Amendment, and

[2] that provision also is not impermissibly vague under the Due Process Clause.

Reversed.

Justice Stevens filed concurring opinion in which Justice Breyer joined.

Justice Souter filed dissenting opinion in which Justice Ginsburg joined.

West Headnotes (26)

[1] **Constitutional Law**
Lack of constitutional protection

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2189 Obscenity in General
92k2191 Lack of constitutional protection

"Obscene speech," sexually explicit material that violates fundamental notions of decency, is not protected by the First Amendment. U.S.C.A. Const.Amend. 1.

11 Cases that cite this headnote

[2] **Constitutional Law**
Lack of constitutional protection

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2189 Obscenity in General
92k2191 Lack of constitutional protection

To protect explicit material that has social value, Supreme Court has limited scope of obscenity exception to First Amendment protection, and has overturned convictions for the distribution of sexually graphic but nonobscene material. U.S.C.A. Const.Amend. 1.

6 Cases that cite this headnote

[3] **Obscenity**
Depictions of Minors;Child Pornography

281 Obscenity
281III Publications, Photographs, and Videos
281k165 Depictions of Minors;Child Pornography
281k166 In general
(Formerly 281k5.2)

"Child pornography" consists of sexually explicit visual portrayals that feature children.

17 Cases that cite this headnote

[4] **Constitutional Law**
Pornography

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2244 Children and Minors, Protection of
92k2246 Pornography

Statute which proscribes the distribution of all child pornography, even material that does not qualify as obscenity, does not on its face violate the First Amendment right to free speech. U.S.C.A. Const.Amend. 1.

14 Cases that cite this headnote

[5] **Obscenity**
Power to regulate

281 Obscenity
281I In General
281k107 Constitutional, Statutory, and Regulatory Provisions
281k111 Power to regulate
(Formerly 281k2.5)

Government may criminalize the possession of child pornography, even though it may not criminalize the mere possession of obscene material involving adults.

10 Cases that cite this headnote

[6] **Constitutional Law**
Prohibition of substantial amount of speech

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1519 Overbreadth
92k1521 Prohibition of substantial amount of speech

According to First Amendment "overbreadth doctrine," statute is facially invalid if it prohibits a substantial amount of protected speech. U.S.C.A. Const.Amend. 1.

191 Cases that cite this headnote

[7] **Constitutional Law**
Substantial impact, necessity of

92 Constitutional Law
92IX Overbreadth in General
92k1141 Substantial impact, necessity of

Statute's overbreadth must be substantial, not only in absolute sense, but also relative to statute's plainly legitimate sweep. U.S.C.A. Const.Amend. 1.

102 Cases that cite this headnote

[8] **Constitutional Law**
Use as last resort;sparing use

92 Constitutional Law
92IX Overbreadth in General
92k1142 Use as last resort;sparing use

Invalidation for overbreadth is strong medicine that is not to be casually employed. U.S.C.A. Const.Amend. 1.

43 Cases that cite this headnote

[9] **Constitutional Law**
Statutes in general

92 Constitutional Law
92IX Overbreadth in General
92k1140.2 Statutes in general
(Formerly 92k1140)

First step in overbreadth analysis is to construe challenged statute; it is impossible to determine whether statute reaches too far without first knowing what statute covers. U.S.C.A. Const.Amend. 1.

115 Cases that cite this headnote

[10] **Obscenity**
Depiction of actual child;virtual or computer-generated images

Obscenity
Receiving

281 Obscenity
281III Publications, Photographs, and Videos

281k165 Depictions of Minors;Child Pornography
281k168 Depiction of actual child;virtual or computer-generated images
(Formerly 281k1.2)
281 Obscenity
281III Publications, Photographs, and Videos
281k165 Depictions of Minors;Child Pornography
281k170 Receiving
281k170(1) In general
(Formerly 281k1.2)

Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act section prohibiting offers to provide and requests to obtain child pornography does not require actual existence of child pornography and rather than targeting underlying material bans collateral speech that introduces such material into child-pornography distribution network; thus, Internet user who solicits child pornography from undercover agent violates statute even if officer possesses no child pornography, and likewise person who advertises virtual child pornography as depicting actual children also falls within its reach. 18 U.S.C.A. § 2252A(a)(3)(B).

37 Cases that cite this headnote

[11] Obscenity
Knowledge or intent

281 Obscenity
281III Publications, Photographs, and Videos
281k165 Depictions of Minors;Child Pornography
281k167 Knowledge or intent
(Formerly 281k1.2)

Scienter requirement of Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act provision criminalizing the pandering or solicitation of child pornography applies to every element of both of the immediately following subdivisions. 18 U.S.C.A. § 2252A(a)(3)(A, B).

2 Cases that cite this headnote

[12] Obscenity
Depictions of Minors;Child Pornography

281 Obscenity
281III Publications, Photographs, and Videos
281k165 Depictions of Minors;Child Pornography
281k166 In general
(Formerly 281k1.2)

Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act pandering provision's string of operative verbs "advertises, promotes, presents, distributes, or solicits," is reasonably read to have a transactional connotation, i.e., statute penalizes speech that accompanies or seeks to induce transfer of child pornography, via or reproduction or physical delivery, from one person to another. 18 U.S.C.A. § 2252A(a)(3)(B).

6 Cases that cite this headnote

[13] Statutes
Associated terms and provisions; noscitur a sociis

361 Statutes
361III Construction
361III(E) Statute as a Whole;Relation of Parts to Whole and to One Another
361k1159 Associated terms and provisions; noscitur a sociis
(Formerly 361k193)

Commonsense canon of "noscitur a sociis" counsels that a word is given more precise content by the neighboring words with which it is associated.

87 Cases that cite this headnote

[14] Obscenity
Knowledge or intent

281 Obscenity
281III Publications, Photographs, and Videos
281k165 Depictions of Minors;Child Pornography
281k167 Knowledge or intent
(Formerly 281k1.2)

Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act pandering provision phrase "in a manner that reflects the belief" includes both subjective and objective components. 18 U.S.C.A. § 2252A(a)(3)(B).

Cases that cite this headnote

[15] **Obscenity**
Knowledge or intent
281 Obscenity
281III Publications, Photographs, and Videos
281k165 Depictions of Minors;Child Pornography
281k167 Knowledge or intent
(Formerly 281k1.2)

Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act pandering provision key phrase, "in a manner that is intended to cause another to believe," contains only a subjective element. 18 U.S.C.A. § 2252A(a)(3)(B).

2 Cases that cite this headnote

[16] **Constitutional Law**
Sex offenses against children
Obscenity
Depiction of minors;child pornography
92 Constitutional Law
92IX Overbreadth in General
92k1143 Particular Issues and Applications
92k1143(15) Criminal Justice
92k1143(20) Sex offenses against children
(Formerly 92k1145(2))
281 Obscenity
281I In General
281k107 Constitutional, Statutory, and Regulatory Provisions
281k112 Validity of Statutes, Ordinances, and Regulations
281k112(9) Depiction of minors;child pornography
(Formerly 281k1.2)

Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act definition of "sexually explicit conduct," the visual depiction of which when engaged in by actual minor is covered by Act's pandering and soliciting prohibition even when it is not obscene, is very similar to definition of "sexual conduct" in New York statute upheld against overbreadth challenge in Supreme Court's 1982 *Ferber* decision. 18 U.S.C.A. § 2252A(a)(3)(B).

31 Cases that cite this headnote

[17] **Constitutional Law**
Solicitation
92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(H) Law Enforcement;Criminal Conduct
92k1816 Solicitation
(Formerly 92k1540)

Offers to engage in illegal transactions are categorically excluded from First Amendment protection. U.S.C.A. Const.Amend. 1.

53 Cases that cite this headnote

[18] **Constitutional Law**
Sale, distribution, dissemination, or reproduction of materials involving children and minors
Obscenity
Depiction of minors;child pornography
92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2244 Children and Minors, Protection of
92k2250 Sale, distribution, dissemination, or reproduction of materials involving children and minors
281 Obscenity
281I In General
281k107 Constitutional, Statutory, and Regulatory Provisions
281k112 Validity of Statutes, Ordinances, and Regulations
281k112(9) Depiction of minors;child pornography
(Formerly 281k2.5)

Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act pandering provision, as

construed to criminalize only offers to provide or requests to obtain contraband, child obscenity and child pornography involving actual children, does not criminalize a substantial amount of protected expressive activity and is thus not overbroad under the First Amendment. U.S.C.A. Const.Amend. 1; 18 U.S.C.A. § 2252A(a)(3)(B).

29 Cases that cite this headnote

[19] **Constitutional Law**
Sale, distribution, dissemination, or reproduction of materials involving children and minors

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2244 Children and Minors, Protection of
92k2250 Sale, distribution, dissemination, or reproduction of materials involving children and minors

Offers to provide or requests to obtain child pornography are categorically excluded from the First Amendment. U.S.C.A. Const.Amend. 1.

36 Cases that cite this headnote

[20] **Obscenity**
Sale, Transportation, or Distribution

281 Obscenity
281III Publications, Photographs, and Videos
281k165 Depictions of Minors;Child Pornography
281k171 Sale, Transportation, or Distribution
281k171(1) In general
(Formerly 281k1.2)

Term "promotes" in Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act pandering provision does not refer to abstract advocacy, such as statement "I believe that child pornography should be legal" or even "I encourage you to obtain child pornography"; it refers to the recommendation of a particular piece of purported child pornography with the intent of initiating a transfer. 18 U.S.C.A. § 2252A(a)(3)(B).

4 Cases that cite this headnote

[21] **Constitutional Law**
Statutes in general

92 Constitutional Law
92IX Overbreadth in General
92k1140.2 Statutes in general
(Formerly 92k1140)

Mere fact that one can conceive of some impermissible applications of statute is not sufficient to render it susceptible to overbreadth challenge. U.S.C.A. Const.Amend. 1.

45 Cases that cite this headnote

[22] **Constitutional Law**
Vagueness in General

Constitutional Law
Certainty and definiteness;vagueness

92 Constitutional Law
92X First Amendment in General
92X(A) In General
92k1159 Vagueness in General
92k1160 In general
92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3905 Certainty and definiteness;vagueness

"Vagueness" doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment. U.S.C.A. Const.Amends. 1, 5.

110 Cases that cite this headnote

[23] **Constitutional Law**
Certainty and definiteness in general

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)2 Nature and Elements of Crime
92k4502 Creation and Definition of Offense
92k4505 Certainty and definiteness in general

Conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary

intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement. U.S.C.A. Const.Amend. 5.

268 Cases that cite this headnote

[24] **Constitutional Law**
Vagueness in General
Constitutional Law
Prohibition of substantial amount of speech

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(A) Persons Entitled to Raise Constitutional Questions;Standing
92VI(A)5 Vagueness in General
92k735 In general
92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1519 Overbreadth
92k1521 Prohibition of substantial amount of speech

Although ordinarily plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others, in First Amendment context plaintiffs may argue that statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech. U.S.C.A. Const.Amend. 1.

138 Cases that cite this headnote

[25] **Constitutional Law**
Statutes

92 Constitutional Law
92VIII Vagueness in General
92k1130.7 Vagueness as to Covered Conduct or Standards of Enforcement;Offenses and Penalties
92k1130.10 Statutes
(Formerly 110k13.1, 110k13.1(1))

What renders statute "vague" is not possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved, but rather the indeterminacy of precisely what that fact is.

77 Cases that cite this headnote

[26] **Constitutional Law**
Obscenity and lewdness
Obscenity
Depiction of minors;child pornography

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)2 Nature and Elements of Crime
92k4502 Creation and Definition of Offense
92k4509 Particular Offenses
92k4509(20) Obscenity and lewdness
281 Obscenity
281I In General
281k107 Constitutional, Statutory, and Regulatory Provisions
281k112 Validity of Statutes, Ordinances, and Regulations
281k112(9) Depiction of minors;child pornography
(Formerly 281k2.5)

Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act pandering provision is not impermissibly vague under Due Process Clause; statute requires that defendant hold, and make statement that reflects belief, that material is child pornography, or that he communicate in manner intended to cause another so to believe, which are clear questions of fact. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. § 2252A(a)(3)(B).

23 Cases that cite this headnote

West Codenotes

Prior Version Recognized as Unconstitutional
18 U.S.C.A. § 2256(8)(B),(D)

Negative Treatment Reconsidered
18 U.S.C.A. § 2252A(a)(3)(B).

****1833** *Syllabus* [*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

After this Court found facially overbroad a federal statutory provision criminalizing ****1834** the possession and distribution of material pandered as child pornography, regardless of whether it actually was that, *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403, Congress passed the pandering and solicitation provision at issue, 18 U.S.C. § 2252A(a)(3)(B). Respondent Williams pleaded guilty to this offense and others, but reserved the right to challenge his pandering conviction's constitutionality. The District Court rejected his challenge, but the Eleventh Circuit reversed, finding the statute both overbroad under the First Amendment and impermissibly vague under the Due Process Clause.

Held:

1. Section 2252A(a)(3)(B) is not overbroad under the First Amendment. Pp. 1838 – 1845.

(a) A statute is facially invalid if it prohibits a substantial amount of protected speech. Section 2252A(a)(3)(B) generally prohibits offers to provide and requests to obtain child pornography. It targets not the underlying material, but the collateral speech introducing such material into the child-pornography distribution network. Its definition of material or purported material that may not be pandered or solicited precisely tracks the material held constitutionally proscribable in *New York v. Ferber,* 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113, and *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419: obscene material depicting (actual or virtual) children engaged in sexually explicit conduct, and any other material depicting actual children engaged in sexually explicit conduct. The statute's important features include: (1) a scienter requirement; (2) operative verbs that are reasonably read to penalize speech that accompanies or seeks to induce a child-pornography transfer from one person to another; (3) a phrase—"in a manner that reflects the belief," *ibid.*—that has both the subjective component that the defendant must actually have held the "belief" that the material or purported material was child pornography, and the objective component that the statement or action must manifest that belief; (4) a phrase —"in a manner ... that is intended to cause another to believe," *ibid.*—that has only the subjective element that the defendant must "intend" that the listener believe the material to be child pornography; and (5) a "sexually explicit conduct" definition that is very similar to that in the New York statute upheld in *Ferber*. Pp. 1838 – 1841.

(b) As thus construed, the statute does not criminalize a substantial amount of protected expressive activity. Offers to engage in illegal transactions are categorically excluded from First Amendment protection. *E.g., Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations,* 413 U.S. 376, 388, 93 S.Ct. 2553, 37 L.Ed.2d 669. The Eleventh Circuit mistakenly believed that this exclusion extended only to commercial offers to provide or receive contraband. The exclusion's rationale, however, is based not on the less privileged status of commercial speech, but on the principle that offers to give or receive what it is unlawful to possess have no social value and thus enjoy no First Amendment protection. The constitutional defect in *Free Speech Coalition* 's pandering provision was that it went beyond pandering to prohibit possessing material that could not otherwise be proscribed. The Eleventh Circuit's erroneous conclusion led it to apply strict scrutiny to § 2252A(a)(3)(B), lodging three fatal objections that lack merit. Pp. 1841 – 1845.

2. Section 2252A(a)(3)(B) is not impermissibly vague under the Due Process ****1835** Clause. A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement. *Hill v. Colorado,* 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597. In the First Amendment context plaintiffs may argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494–495, and nn. 6 and 7, 102 S.Ct. 1186, 71 L.Ed.2d 362. The Eleventh Circuit mistakenly believed that "in a manner that reflects the belief" and "in a manner ... that is intended to cause another to believe" were vague and standardless phrases that left the public with no objective measure of conformance. What renders a statute vague, however, is not the possibility that it will sometimes be difficult

to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of what that fact is. See, *e.g., Coates v. Cincinnati,* 402 U.S. 611, 614, 91 S.Ct. 1686, 29 L.Ed.2d 214. There is no such indeterminacy here. The statute's requirements are clear questions of fact. It may be difficult in some cases to determine whether the requirements have been met, but courts and juries every day pass upon the reasonable import of a defendant's statements and upon "knowledge, belief and intent." *American Communications Assn. v. Douds,* 339 U.S. 382, 411, 70 S.Ct. 674, 94 L.Ed. 925. Pp. 1845 – 1847.

444 F.3d 1286, reversed.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C.J., and STEVENS, KENNEDY, THOMAS, BREYER, and ALITO, JJ., joined. STEVENS, J., filed a concurring opinion, in which BREYER, J., joined, *post*, pp. 1847 – 1848. SOUTER, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, pp. 1848 – 1858.

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Opinion

Justice SCALIA delivered the opinion of the Court.

***288** Section 2252A(a)(3)(B) of Title 18, United States Code, criminalizes, in certain specified circumstances, the pandering or solicitation of child pornography. This case presents the question whether that statute is overbroad under the First Amendment or impermissibly vague under the Due Process Clause of the Fifth Amendment.

I

A

[1] [2] We have long held that obscene speech—sexually explicit material that violates fundamental notions of decency—is not protected by the First Amendment. ****1836** See *Roth v. United States,* 354 U.S. 476, 484–485, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). But to protect explicit material that has social value, we have limited the scope of the obscenity exception, and have overturned convictions for the distribution of sexually graphic but nonobscene material. See *Miller v. California,* 413 U.S. 15, 23–24, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973); see also, *e.g., Jenkins v. Georgia,* 418 U.S. 153, 161, 94 S.Ct. 2750, 41 L.Ed.2d 642 (1974).

[3] [4] [5] Over the last 25 years, we have confronted a related and overlapping category of proscribable speech: child pornography. See *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002); *Osborne v. Ohio,* 495 U.S. 103, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990); *New York v. Ferber,* 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). This consists of sexually explicit visual portrayals that feature children. We have held that a statute which proscribes the distribution of all child pornography, even material that does not qualify as obscenity, does not on its face violate the First Amendment. See *id.,* at 751–753, 756–764, 102 S.Ct. 3348. Moreover, we have held that the government may criminalize the possession of child pornography, even though it may not criminalize the mere possession of obscene material involving adults. Compare *Osborne,supra,* Sat 111, 110 S.Ct. 1691,; ***289** with *Stanley v. Georgia,* 394 U.S. 557, 568, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969).

The broad authority to proscribe child pornography is not, however, unlimited. Four Terms ago, we held facially overbroad two provisions of the federal Child Pornography Protection Act of 1996 (CPPA). *Free Speech Coalition,* 535 U.S., at 258, 122 S.Ct. 1389. The first of these banned the possession and distribution of " 'any visual depiction' " that " 'is, or appears to be, of a minor engaging in sexually explicit conduct,' " even if it

contained only youthful-looking adult actors or virtual images of children generated by a computer. *Id.,* at 239–241, 122 S.Ct. 1389 (quoting 18 U.S.C. § 2256(8)(B)). This was invalid, we explained, because the child-protection rationale for speech restriction does not apply to materials produced without children. See 535 U.S., at 249–251, 254, 122 S.Ct. 1389. The second provision at issue in *Free Speech Coalition* criminalized the possession and distribution of material that had been pandered as child pornography, regardless of whether it actually was that. See *id.,* at 257, 122 S.Ct. 1389 (citing 18 U.S.C. § 2256(8)(D)). A person could thus face prosecution for possessing unobjectionable material that someone else had pandered. 535 U.S., at 258, 122 S.Ct. 1389. We held that this prohibition, which did "more than prohibit pandering," was also facially overbroad. *Ibid.*

After our decision in *Free Speech Coalition,* Congress went back to the drawing board and produced legislation with the unlikely title of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, 117 Stat. 650. We shall refer to it as the Act. Section 503 of the Act amended 18 U.S.C. § 2252A to add a new pandering and solicitation provision, relevant portions of which now read as follows:

"(a) Any person who—

.....

"(3) knowingly—

.....

"(B) advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign ***290** commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, ****1837** that the material or purported material is, or contains—

"(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or

"(ii) a visual depiction of an actual minor engaging in sexually explicit conduct,

.....

"shall be punished as provided in subsection (b)." § 2252A(a)(3)(B) (2000 ed., Supp. V).

Section 2256(2)(A) defines " 'sexually explicit conduct' " as

"actual or simulated—

"(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

"(ii) bestiality;

"(iii) masturbation;

"(iv) sadistic or masochistic abuse; or

"(v) lascivious exhibition of the genitals or pubic area of any person."

Violation of § 2252A(a)(3)(B) incurs a minimum sentence of 5 years imprisonment and a maximum of 20 years. 18 U.S.C. § 2252A(b)(1).

The Act's express findings indicate that Congress was concerned that limiting the child-pornography prohibition to material that could be *proved* to feature actual children, as our decision in *Free Speech Coalition* required, would enable many child pornographers to evade conviction. See § 501(9), (10), 117 Stat. 677. The emergence of new technology and the repeated retransmission of picture files over the Internet could make it nearly impossible to prove that a particular image was produced using real children—even though "[t]here is no substantial evidence that any of the child pornography ***291** images being trafficked today were made other than by the abuse of real children," virtual imaging being prohibitively expensive. § 501(5), (7), (8), (11), *id.,* at 676–678; see also Dept. of Justice, Office of Community Oriented Policing Services, R. Wortley & S. Smallbone, Child Pornography on the Internet 9 (May 2006), online at http://www.cops. usdoj.gov/mime/open.pdf?Item =1729 (hereinafter Child Pornography on the Internet) (as visited Jan. 7, 2008, and available in Clerk of Court's case file).

B

The following facts appear in the opinion of the Eleventh Circuit, 444 F.3d 1286, 1288 (2006). On April 26, 2004, respondent Michael Williams, using a sexually explicit

screen name, signed in to a public Internet chat room. A Secret Service agent had also signed in to the chat room under the moniker "Lisa n Miami." The agent noticed that Williams had posted a message that read: "Dad of toddler has 'good' pics of her an [sic] me for swap of your toddler pics, or live cam." The agent struck up a conversation with Williams, leading to an electronic exchange of nonpornographic pictures of children. (The agent's picture was in fact a doctored photograph of an adult.) Soon thereafter, Williams messaged that he had photographs of men molesting his 4–year–old daughter. Suspicious that "Lisa n Miami" was a law-enforcement agent, before proceeding further Williams demanded that the agent produce additional pictures. When he did not, Williams posted the following public message in the chat room: "HERE ROOM; I CAN PUT UPLINK CUZ IM FOR REAL—SHE CANT." Appended to this declaration was a hyperlink that, when clicked, led to seven pictures of actual children, aged approximately 5 to 15, engaging in sexually explicit conduct and displaying their genitals. The Secret Service then obtained a search warrant for Williams's home, where agents seized two hard ***292** drives containing at least 22 images ****1838** of real children engaged in sexually explicit conduct, some of it sadomasochistic.

Williams was charged with one count of pandering child pornography under § 2252A(a)(3)(B) and one count of possessing child pornography under § 2252A(a)(5)(B). He pleaded guilty to both counts but reserved the right to challenge the constitutionality of the pandering conviction. The District Court rejected his challenge, and imposed concurrent 60–month prison terms on the two counts and a statutory assessment of $100 for each count, see 18 U.S.C. § 3013. No. 04–20299–CR–MIDDLEBROOKS (SD Fla., Aug. 20, 2004), App. B to Pet. for Cert. 46a–69a. The United States Court of Appeals for the Eleventh Circuit reversed the pandering conviction, holding that the statute was both overbroad and impermissibly vague. 444 F.3d, at 1308–1309.

We granted certiorari. 549 U.S. 1304, 127 S.Ct. 1874, 167 L.Ed.2d 363 (2007).

II

A

[6] [7] [8] According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech. The doctrine seeks to strike a balance between competing social costs. *Virginia v. Hicks,* 539 U.S. 113, 119–120, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003). On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. On the other hand, invalidating a law that in some of its applications is perfectly constitutional—particularly a law directed at conduct so antisocial that it has been made criminal—has obvious harmful effects. In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be *substantial,* not only in an absolute sense, but also relative to the statute's plainly legitimate sweep. See ***293** *Board of Trustees of State Univ. of N.Y. v. Fox,* 492 U.S. 469, 485, 109 S.Ct. 3028, 106 L.Ed.2d 388 1989); *Broadrick v. Oklahoma,* 413 U.S. 601, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). Invalidation for overbreadth is " ' "strong medicine" ' " that is not to be "casually employed." *Los Angeles Police Dept. v. United Reporting Publishing Corp.,* 528 U.S. 32, 39, 120 S.Ct. 483, 145 L.Ed.2d 451 (1999) (quoting *Ferber,* 458 U.S., at 769, 102 S.Ct. 3348).

[9] [10] The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers. Generally speaking, § 2252A(a)(3)(B) prohibits offers to provide and requests to obtain child pornography. The statute does not require the actual existence of child pornography. In this respect, it differs from the statutes in *Ferber, Osborne,* and *Free Speech Coalition,* which prohibited the possession or distribution of child pornography. Rather than targeting the underlying material, this statute bans the collateral speech that introduces such material into the child-pornography distribution

****1839** network. Thus, an Internet user who solicits child pornography from an undercover agent violates the statute, even if the officer possesses no child pornography. Likewise, a person who advertises virtual child pornography as depicting actual children also falls within the reach of the statute.

The statute's definition of the material or purported material that may not be pandered or solicited precisely

tracks the material held constitutionally proscribable in *Ferber* and *Miller:* obscene material depicting (actual or virtual) children engaged in sexually explicit conduct, and any other material depicting actual children engaged in sexually explicit conduct. See *Free Speech Coalition,* 535 U.S., at 245–246, 122 S.Ct. 1389 (stating that the First Amendment does not protect obscenity or pornography produced with actual children); *id.,* at 256, 122 S.Ct. 1389 (holding invalid the challenged provision of the CPPA because it "cover[ed] materials beyond the categories recognized in *Ferber* and *Miller*").

A number of features of the statute are important to our analysis:

***294** **[11]** First, the statute includes a scienter requirement. The first word of § 2252A(a)(3)—"knowingly"—applies to both of the immediately following subdivisions, both the previously existing § 2252A(a)(3)(A) [1] and the new § 2252A(a)(3)(B) at issue here. We think that the best reading of the term in context is that it applies to every element of the two provisions. This is not a case where grammar or structure enables the challenged provision or some of its parts to be read apart from the "knowingly" requirement. Here "knowingly" introduces the challenged provision itself, making clear that it applies to that provision in its entirety; and there is no grammatical barrier to reading it that way.

1 Section 2252A(a)(3)(A) (2000 ed., Supp. V) reads: "reproduces any child pornography for distribution through the mails, or in interstate or foreign commerce by any means, including by computer."

[12] **[13]** Second, the statute's string of operative verbs—"advertises, promotes, presents, distributes, or solicits"—is reasonably read to have a transactional connotation. That is to say, the statute penalizes speech that accompanies or seeks to induce a transfer of child pornography—via reproduction or physical delivery—from one person to another. For three of the verbs, this is obvious: Advertising, distributing, and soliciting are steps taken in the course of an actual or proposed transfer of a product, typically but not exclusively in a commercial market. When taken in isolation, the two remaining verbs —"promotes" and "presents"—are susceptible of multiple and wide-ranging meanings. In context, however, those meanings are narrowed by the commonsense canon of *noscitur a sociis*—which counsels that a word is given more precise content by the neighboring words with which it is associated. See *Jarecki v. G.D. Searle & Co.,* 367 U.S. 303, 307, 81 S.Ct. 1579, 6 L.Ed.2d 859 (1961); 2A N. Singer & J. Singer, Sutherland Statutes and Statutory Construction § 47:16 (7th ed.2007). "Promotes," in a list that includes "solicits," "distributes," and "advertises," is most sensibly read to mean the act of recommending purported child pornography to another person ***295** for his acquisition. See American Heritage Dictionary 1403 (4th ed.2000) (def. 4: "To attempt to sell or popularize by advertising or publicity"). Similarly, "presents," in the context of the other verbs with which it is associated, means showing or offering the child pornography to another person with a view to his acquisition. See *id.,* at 1388 (def. 3a: ****1840** "To make a gift or award of"). (The envisioned acquisition, of course, could be an electronic one, for example, reproduction of the image on the recipient's computer screen.)

To be clear, our conclusion that all the words in this list relate to transactions is not to say that they relate to *commercial* transactions. One could certainly "distribute" child pornography without expecting payment in return. Indeed, in much Internet file sharing of child pornography each participant makes his files available for free to other participants—as Williams did in this case. "Distribution may involve sophisticated pedophile rings or organized crime groups that operate for profit, but in many cases, is carried out by individual amateurs who seek no financial reward." Child Pornography on the Internet 9. To run afoul of the statute, the speech need only accompany or seek to induce the transfer of child pornography from one person to another.

[14] Third, the phrase "in a manner that reflects the belief" includes both subjective and objective components. "[A] manner that reflects the belief" is quite different from "a manner that would give one cause to believe." The first formulation suggests that the defendant must actually have held the subjective "belief" that the material or purported material was child pornography. Thus, a misdescription that leads the listener to believe the defendant is offering child pornography, when the defendant in fact does not believe the material is child pornography, does not violate this prong of the statute. (It may, however, violate the "manner ... that is intended to cause another to believe" prong if the misdescription is intentional.) There is also an objective ***296** component to the phrase "manner that reflects the belief." The statement or action must objectively manifest a belief that

the material is child pornography; a mere belief, without an accompanying statement or action that would lead a reasonable person to understand that the defendant holds that belief, is insufficient.

[15] Fourth, the other key phrase, "in a manner ... that is intended to cause another to believe," contains only a subjective element: The defendant must "intend" that the listener believe the material to be child pornography, and must select a manner of "advertising, promoting, presenting, distributing, or soliciting" the material that *he* thinks will engender that belief—whether or not a reasonable person would think the same. (Of course in the ordinary case the proof of the defendant's intent will be the fact that, as an objective matter, the manner of "advertising, promoting, presenting, distributing, or soliciting" plainly sought to convey that the material was child pornography.)

[16] Fifth, the definition of "sexually explicit conduct" (the visual depiction of which, engaged in by an actual minor, is covered by the Act's pandering and soliciting prohibition even when it is not obscene) is very similar to the definition of "sexual conduct" in the New York statute we upheld against an overbreadth challenge in *Ferber*. That defined "sexual conduct" as " 'actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.' " 458 U.S., at 751, 102 S.Ct. 3348. Congress used essentially the same constitutionally approved definition in the present Act. If anything, the fact that the defined term here is "sexually *explicit* conduct," rather than (as in *Ferber*) merely "sexual conduct," renders the definition more immune from facial constitutional attack. "[S]imulated sexual intercourse" (a phrase found in the *Ferber* definition as well) is even less susceptible here of application to the ****1841** sorts of sex scenes found in R-rated movies—which suggest that intercourse is taking place withoutexplicitly ***297** depicting it, and without causing viewers to believe that the actors are actually engaging in intercourse. "Sexually *explicit* conduct" connotes actual depiction of the sex act rather than merely the suggestion that it is occurring. And "simulated" sexual intercourse is not sexual intercourse that is merely suggested, but rather sexual intercourse that is explicitly portrayed, even though (through camera tricks or otherwise) it may not actually have occurred. The portrayal must cause a reasonable viewer to believe that the actors actually engaged in that conduct on camera. Critically, unlike in *Free Speech Coalition*, § 2252A(a)(3)(B)(ii)'s requirement of a "visual depiction of an actual minor" makes clear that, although the sexual intercourse may be simulated, it must involve actual children (unless it is obscene). This change eliminates any possibility that virtual child pornography or sex between youthful-looking adult actors might be covered by the term "simulated sexual intercourse."

B

We now turn to whether the statute, as we have construed it, criminalizes a substantial amount of protected expressive activity.

[17] **[18]** Offers to engage in illegal transactions are categorically excluded from First Amendment protection. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations,* 413 U.S. 376, 388, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973); *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 498, 69 S.Ct. 684, 93 L.Ed. 834 (1949). One would think that this principle resolves the present case, since the statute criminalizes only offers to provide or requests to obtain contraband—child obscenity and child pornography involving actual children, both of which are proscribed, see 18 U.S.C. § 1466A(a), § 2252A(a)(5)(B) (2000 ed., Supp. V), and the proscription of which is constitutional, see *Free Speech Coalition,* 535 U.S., at 245–246, 256, 122 S.Ct. 1389. The Eleventh Circuit, however, believed that the exclusion of First Amendment protection extended only to *commercial* offers to provide or receive contraband: ***298** "Because [the statute] is not limited to commercial speech but extends also to non-commercial promotion, presentation, distribution, and solicitation, we must subject the content-based restriction of the PROTECT Act pandering provision to strict scrutiny....." 444 F.3d, at 1298.

This mistakes the rationale for the categorical exclusion. It is based not on the less privileged First Amendment status of commercial speech, see *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.,* 447 U.S. 557, 562–563, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), but on the principle that offers to give or receive what it is unlawful to possess have no social value and thus, like obscenity, enjoy no First Amendment protection, see *Pittsburgh Press, supra,* at 387–389, 93 S.Ct. 2553. [2] Many

long established criminal **1842 proscriptions—such as laws against conspiracy, incitement, and solicitation—criminalize speech (commercial or not) that is intended to induce or commence illegal activities. See, *e.g.,* ALI, Model Penal Code § 5.02(1) (1985) (solicitation to commit a crime); § 5.03(1)(a) (conspiracy to commit a crime). Offers to provide or requests to obtain unlawful material, whether as part of a commercial exchange or not, are similarly undeserving of First Amendment protection. It would be an odd constitutional principle that permitted the government to prohibit offers to sell illegal drugs, but not offers to give them away for free.

2 In *Pittsburgh Press,* the newspaper argued that we should afford that category of commercial speech which consists of help-wanted ads the same level of First Amendment protection as noncommercial speech, because of its important information-exchange function. We replied: "Whatever the merits of this contention may be in other contexts, it is unpersuasive in this case. Discrimination in employment is not only commercial activity, it is *illegal* commercial activity.... We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes." 413 U.S., at 388, 93 S.Ct. 2553. The import of this response is that noncommercial proposals to engage in illegal activity have no greater protection than commercial proposals to do so.

To be sure, there remains an important distinction between a proposal to engage in illegal activity and the abstract *299 advocacy of illegality. See *Brandenburg v. Ohio,* 395 U.S. 444, 447–448, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) *(per curiam);* see also *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 928–929, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982). The Act before us does not prohibit advocacy of child pornography, but only offers to provide or requests to obtain it. There is no doubt that this prohibition falls well within constitutional bounds. The constitutional defect we found in the pandering provision at issue in *Free Speech Coalition* was that it went *beyond* pandering to prohibit possession of material that could not otherwise be proscribed. 535 U.S., at 258, 122 S.Ct. 1389.

[19] In sum, we hold that offers to provide or requests to obtain child pornography are categorically excluded from the First Amendment. Since the Eleventh Circuit erroneously concluded otherwise, it applied strict scrutiny to § 2252A(a)(3)(B), lodging three fatal objections. We address these objections because they could be recast as arguments that Congress has gone beyond the categorical exception.

The Eleventh Circuit believed it a constitutional difficulty that no child pornography need exist to trigger the statute. In its view, the fact that the statute could punish a "braggart, exaggerator, or outright liar" rendered it unconstitutional. 444 F.3d, at 1298. That seems to us a strange constitutional calculus. Although we have held that the government can ban *both* fraudulent offers, see, *e.g., Illinois ex rel. Madigan v. Telemarketing Associates, Inc.,* 538 U.S. 600, 611–612, 123 S.Ct. 1829, 155 L.Ed.2d 793 (2003), *and* offers to provide illegal products, the Eleventh Circuit would forbid the government from punishing *fraudulent offers to provide illegal products.* We see no logic in that position; if anything, such statements are doubly excluded from the First Amendment.

[20] The Eleventh Circuit held that under *Brandenburg,* the "non-commercial, non-inciteful promotion of illegal child pornography" is protected, and § 2252A(a)(3)(B) therefore overreaches by criminalizing the promotion of child pornography. 444 F.3d, at 1298. As we have discussed earlier, however, *300 the term "promotes" does not refer to abstract advocacy, such as the statement "I believe that child pornography should be legal" or even "I encourage you to obtain child pornography." It refers to the recommendation of a particular piece of purported child pornography with the intent of initiating a transfer.

The Eleventh Circuit found "particularly objectionable" the fact that the "reflects the belief" prong of the statute could ensnare a person who mistakenly believes that material is child pornography. *Ibid.* This objection has two conceptually distinct parts. First, the Eleventh Circuit **1843 thought that it would be unconstitutional to punish someone for mistakenly distributing virtual child pornography as real child pornography. We disagree. Offers to deal in illegal products or otherwise engage in illegal activity do not acquire First Amendment protection when the offeror is mistaken about the factual predicate of his offer. The pandering and solicitation made unlawful by the Act are sorts of inchoate crimes—acts looking toward the commission of another crime, the delivery of child pornography. As with other inchoate crimes—attempt and conspiracy, for example—impossibility of completing the crime because the facts were not as the defendant believed is not a defense. "All courts are in agreement

that what is usually referred to as 'factual impossibility' is no defense to a charge of attempt." 2 W. LaFave, Substantive Criminal Law § 11.5(a)(2) (2d ed.2003). (The author gives as an example "the intended sale of an illegal drug [that] actually involved a different substance." *Ibid.*) See also *United States v. Hamrick,* 43 F.3d 877, 885 (C.A.4 1995) (en banc) (holding that impossibility is no defense to attempt and citing the holdings of four other Circuits); ALI, Model Penal Code § 5.01, Comment, p. 307 (in attempt prosecutions "the defendant's conduct should be measured according to the circumstances as he believes them to be, rather than the circumstances as they may have existed in fact").

***301** Under this heading the Eleventh Circuit also thought that the statute could apply to someone who subjectively believes that an innocuous picture of a child is "lascivious." (Clause (v) of the definition of "sexually explicit conduct" is "lascivious exhibition of the genitals or pubic area of any person." § 2256(2)(A) (2000 ed., Supp. V).) That is not so. The defendant must believe that the picture contains certain material, and that material in fact (and not merely in his estimation) must meet the statutory definition. Where the material at issue is a harmless picture of a child in a bathtub and the defendant, knowing that material, erroneously believes that it constitutes a "lascivious exhibition of the genitals," the statute has no application.

Williams and *amici* raise other objections, which demonstrate nothing so forcefully as the tendency of our overbreadth doctrine to summon forth an endless stream of fanciful hypotheticals. Williams argues, for example, that a person who offers nonpornographic photographs of young girls to a pedophile could be punished under the statute if the pedophile secretly expects that the pictures will contain child pornography. Brief for Respondent 19–20. That hypothetical does not implicate the statute, because the offeror does not hold the belief or intend the recipient to believe that the material is child pornography.

Amici contend that some advertisements for mainstream Hollywood movies that depict underage characters having sex violate the statute. Brief for Free Speech Coalition et al. as *Amici Curiae* 9–18. We think it implausible that a reputable distributor of Hollywood movies, such as Amazon.com, believes that one of these films contains *actual* children engaging in *actual or simulated* sex on camera; and even more implausible that Amazon.com would *intend* to make its customers believe such a thing. The average person understands that sex scenes in mainstream movies use nonchild actors, depict sexual activity in a way that would not rise to ***302** the explicit level necessary under the statute, or, in most cases, both.

There was raised at oral argument the question whether turning child pornography over to the police might not count as "present[ing]" the material. See Tr. of Oral Arg. 9–11. An interpretation of "presents" that would include turning material ****1844** over to the authorities would of course be self-defeating in a statute that looks to the prosecution of people who deal in child pornography. And it would effectively nullify § 2252A(d), which provides an affirmative defense to the possession ban if a defendant promptly delivers child pornography to a law-enforcement agency. (The possession offense would simply be replaced by a pandering offense for delivering the material to law-enforcement officers.) In any event, the verb "present"—along with "distribute" and "advertise," as well as "give," "lend," "deliver," and "transfer"—was used in the definition of "promote" in *Ferber*. See 458 U.S., at 751, 102 S.Ct. 3348 (quoting N.Y. Penal Law Ann. § 263.15 (McKinney 1980)). Despite that inclusion, we had no difficulty concluding that the New York statute survived facial challenge. And in the period since *Ferber,* despite similar statutory definitions in other state statutes, see, *e.g.,* Alaska Stat. § 11.61.125(d) (2006), Del.Code Ann., Tit. 11, § 1109(5) (2007), we are aware of no prosecution for giving child pornography to the police. We can hardly say, therefore, that there is a "realistic danger" that § 2252A(a)(3)(B) will deter such activity. *New York State Club Assn., Inc. v. City of New York,* 487 U.S. 1, 11, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988) (citing *Thornhill v. Alabama,* 310 U.S. 88, 97–98, 60 S.Ct. 736, 84 L.Ed. 1093 (1940)).

[21] It was also suggested at oral argument that the statute might cover documentary footage of atrocities being committed in foreign countries, such as soldiers raping young children. See Tr. of Oral Arg. 5–7. Perhaps so, if the material rises to the high level of explicitness that we have held is required. That sort of documentary footage could of course be the subject of an as-applied challenge. The courts ***303** presumably would weigh the educational interest in the dissemination of information about the atrocities against the government's interest in preventing the distribution of materials that constitute "a permanent record" of the children's degradation

whose dissemination increases "the harm to the child." *Ferber, supra,* at 759, 102 S.Ct. 3348. Assuming that the constitutional balance would have to be struck in favor of the documentary, the existence of that exception would not establish that the statute is *substantially* overbroad. The "mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 800, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). In the vast majority of its applications, this statute raises no constitutional problems whatever.

Finally, the dissent accuses us of silently overruling our prior decisions in *Ferber* and *Free Speech Coalition.* See *post,* at 1854 (opinion of SOUTER, J.). According to the dissent, Congress has made an end run around the First Amendment's protection of virtual child pornography by prohibiting proposals to transact in such images rather than prohibiting the images themselves. But an offer to provide or request to receive virtual child pornography is not prohibited by the statute. A crime is committed only when the speaker believes or intends the listener to believe that the subject of the proposed transaction depicts *real* children. It is simply not true that this means "a protected category of expression [will] inevitably be suppressed," *post,* at 1855. Simulated child pornography will be as available as ever, so long as it is offered and sought *as such,* and not as real child pornography. The dissent would require an exception from the statute's prohibition when, unbeknownst to one or both of the parties to the proposal, ****1845** the completed transaction would not have been unlawful because it is (we have said) protected by the First Amendment. We fail to see what First Amendment interest would be served by drawing a ***304** distinction between two defendants who attempt to acquire contraband, one of whom happens to be mistaken about the contraband nature of what he would acquire. Is Congress prohibited from punishing those who attempt to acquire what they believe to be national-security documents, but which are actually fakes? To ask is to answer. There is no First Amendment exception from the general principle of criminal law that a person attempting to commit a crime need not be exonerated because he has a mistaken view of the facts.

III

[22] [23] [24] As an alternative ground for facial invalidation, the Eleventh Circuit held that § 2252A(a)(3)(B) is void for vagueness. Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment. A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement. *Hill v. Colorado,* 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000); see also *Grayned v. City of Rockford,* 408 U.S. 104, 108–109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). Although ordinarily "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others," we have relaxed that requirement in the First Amendment context, permitting plaintiffs to argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494–495, and nn. 6 and 7, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982); see also *Reno v. American Civil Liberties Union,* 521 U.S. 844, 870–874, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). But "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism,* 491 U.S. 781, 794, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989).

The Eleventh Circuit believed that the phrases " 'in a manner that reflects the belief' " and " 'in a manner ... that ***305** is intended to cause another to believe' " are "so vague and standardless as to what may not be said that the public is left with no objective measure to which behavior can be conformed." 444 F.3d, at 1306. The court gave two examples. First, an e-mail claiming to contain photograph attachments and including a message that says " 'little Janie in the bath—hubba, hubba!' " *Ibid.* According to the Eleventh Circuit, given that the statute does not require the actual existence of illegal material, the Government would have "virtually unbounded discretion" to deem such a statement in violation of the " 'reflects the belief' " prong. *Ibid.* The court's second example was an e-mail entitled " 'Good pics of kids in bed' " with a photograph attachment of toddlers in pajamas asleep in their beds. *Ibid.* The court described three hypothetical senders: a proud grandparent, a "chronic forwarder of cute photos with racy tongue-in-cheek subject lines," and a child molester who seeks to trade the photographs for more graphic material. *Id.,* at 1306–1307. According

to the Eleventh Circuit, because the "manner" in which the photographs are sent is the same in each case, and because the identity of the sender and the content of the photographs are irrelevant under the ****1846** statute, all three senders could arguably be prosecuted for pandering. *Id.,* at 1307.

We think that neither of these hypotheticals, without further facts, would enable a reasonable juror to find, beyond a reasonable doubt, that the speaker believed and spoke in a manner that reflected the belief, or spoke in a manner intended to cause another to believe, that the pictures displayed actual children engaged in "sexually explicit conduct" as defined in the Act. The prosecutions would be thrown out at the threshold.

But the Eleventh Circuit's error is more fundamental than merely its selection of unproblematic hypotheticals. Its basic mistake lies in the belief that the mere fact that close cases can be envisioned renders a statute vague. That is not ***306** so. Close cases can be imagined under virtually any statute. The problem that poses is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt. See *In re Winship,* 397 U.S. 358, 363, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

[25] What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is. Thus, we have struck down statutes that tied criminal culpability to whether the defendant's conduct was "annoying" or "indecent"—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings. See *Coates v. Cincinnati,* 402 U.S. 611, 614, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971); *Reno, supra,* at 870–871, and n. 35, 117 S.Ct. 2329.

[26] There is no such indeterminacy here. The statute requires that the defendant hold, and make a statement that reflects, the belief that the material is child pornography; or that he communicate in a manner intended to cause another so to believe. Those are clear questions of fact. Whether someone held a belief or had an intent is a true-or-false determination, not a subjective judgment such as whether conduct is "annoying" or "indecent." Similarly true or false is the determination whether a particular formulation reflects a belief that material or purported material is child pornography. To be sure, it may be difficult in some cases to determine whether these clear requirements have been met. "But courts and juries every day pass upon knowledge, belief and intent—the state of men's minds—having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred." *American Communications Assn. v. Douds,* 339 U.S. 382, 411, 70 S.Ct. 674, 94 L.Ed. 925 (1950) (citing 2 J. Wigmore, Evidence §§ 244, 256 *et seq.* (3d ed.1940)). And they similarly pass every day upon the reasonable import of a defendant's statements—whether, for example, they fairly convey a false representation, ***307** see, *e.g.,* 18 U.S.C. § 1621 (criminalizing perjury), or a threat of physical injury, see, *e.g.,* § 115(a)(1) (criminalizing threats to assault federal officials). Thus, the Eleventh Circuit's contention that § 2252A(a)(3)(B) gives law-enforcement officials "virtually unfettered discretion" has no merit. No more here than in the case of laws against fraud, conspiracy, or solicitation.

* * *

Child pornography harms and debases the most defenseless of our citizens. Both the State and Federal Governments have sought to suppress it for many years, only to find it proliferating through the new medium of the Internet. This Court held unconstitutional Congress's previous attempt to meet this new threat, and Congress ****1847** responded with a carefully crafted attempt to eliminate the First Amendment problems we identified. As far as the provision at issue in this case is concerned, that effort was successful.

The judgment of the Eleventh Circuit is reversed.

It is so ordered.

Justice STEVENS, with whom Justice BREYER joins, concurring.

My conclusion that this statutory provision is not facially unconstitutional is buttressed by two interrelated considerations on which the Court finds it unnecessary to rely. First, I believe the result to be compelled by the principle that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality," *Hooper v. California,* 155 U.S. 648, 657, 15 S.Ct. 207, 39 L.Ed. 297 (1895); see also *Edward J.*

DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988) (collecting cases).

Second, to the extent the statutory text alone is unclear, our duty to avoid constitutional objections makes it especially appropriate to look beyond the text in order to ascertain the intent of its drafters. It is abundantly clear from ***308** the provision's legislative history that Congress' aim was to target materials advertised, promoted, presented, distributed, or solicited with a lascivious purpose—that is, with the intention of inciting sexual arousal. The provision was described throughout the deliberations in both Houses of Congress as the "pandering" or "pandering and solicitation" provision, despite the fact that the term "pandering" appears nowhere in the statute. See, *e.g.,* 149 Cong. Rec. 4227 (2003) ("[T]he bill criminalizes the pandering of child pornography, creating a new crime to respond to the Supreme Court's recent ruling [in *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002)]" (statement of Sen. Leahy, bill's cosponsor)); H.R. Conf. Rep. No. 108–66, p. 61 (2003) ("[The bill] includes a new pandering provision ... that prohibits advertising, promoting, presenting, distributing, or soliciting ... child pornography" (internal quotation marks omitted)); S.Rep. No. 108–2, p. 10 (2003) ("S. 151 creates three new offenses .... One prohibits the pandering or solicitation of child pornography"); *id.,* at 16 ("[T]he bill criminalizes the pandering of child pornography").

The Oxford English Dictionary defines the verb "pander," as "to minister to the gratification of (another's lust)," 11 Oxford English Dictionary 129 (2d ed.1989). And Black's Law Dictionary provides, as relevant, this definition of "pandering": "The act or offense of selling or distributing textual or visual material (such as magazines or videotapes) openly advertised to appeal to the recipient's sexual interest." Black's Law Dictionary 1142 (8th ed.2004) (hereinafter Black's).[1] Consistent with these dictionary definitions, our cases have explained that "pandering" is " 'the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest,' " ***309** *Ginzburg v. United States,* 383 U.S. 463, 467, and n. 7, 86 S.Ct. 942, 16 L.Ed.2d 31 (1966) (quoting *Roth v. United States,* 354 U.S. 476, 495–496, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957)).[2]

1 The first definition offered is: "The act or offense of recruiting a prostitute, finding a place of business for a prostitute, or soliciting customers for a prostitute." Black's 1142.

2 As I have explained elsewhere, *Ginzburg* has long since lost its force as law, see, *e.g., FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 249, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) (opinion concurring in part and dissenting in part) ("*Ginzburg* was decided before the Court extended First Amendment protection to commercial speech and cannot withstand our decision in *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976)"). Still, the case's explication of the meaning of "pandering" is instructive.

****1848** It was against this backdrop that Congress crafted the provision we uphold today. Both this context and the statements surrounding the provision's enactment convince me that in addition to the other limitations the Court properly concludes constrain the reach of the statute, the heightened scienter requirements described *ante,* at 1840 – 1841, contain an element of lasciviousness.

The dissent argues that the statute impermissibly undermines our First Amendment precedents insofar as it covers proposals to transact in constitutionally protected material. It is true that proof that a pornographic but not obscene representation did not depict real children would place that representation on the protected side of the line. But any constitutional concerns that might arise on that score are surely answered by the construction the Court gives the statute's operative provisions; that is, proposing a transaction in such material would not give rise to criminal liability under the statute unless the defendant actually believed, or intended to induce another to believe, that the material in question depicted real children.

Accordingly, when material which is protected—particularly if it possesses serious literary, artistic, political, or scientific value—is advertised, promoted, presented, distributed, or solicited for some lawful and nonlascivious purpose, such conduct is not captured by the statutory prohibition. Cf. *Miller v. California,* 413 U.S. 15, 24–25, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).

***310** Justice SOUTER, with whom Justice GINSBURG joins, dissenting.

Dealing in obscenity is penalized without violating the First Amendment, but as a general matter pornography lacks the harm to justify prohibiting it. If, however, a photograph (to take the kind of image in this case) shows an actual minor child as a pornographic subject, its transfer and even its possession may be made criminal. *New York v. Ferber,* 458 U.S. 747, 765–766, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982); *Osborne v. Ohio,* 495 U.S. 103, 110–111, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990). The exception to the general rule rests not on the content of the picture but on the need to foil the exploitation of child subjects, *Ferber,* 458 U.S., at 759–760, 102 S.Ct. 3348, and the justification limits the exception: only pornographic photographs of actual children may be prohibited, see *id.,* at 763, 764, 102 S.Ct. 3348; *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 249–251, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002). Thus, just six years ago the Court struck down a statute outlawing particular material merely represented to be child pornography, but not necessarily depicting actual children. *Id.,* at 257–258, 122 S.Ct. 1389.

The Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003(Act), 117 Stat. 650, was enacted in the wake of *Free Speech Coalition*. The Act responds by avoiding any direct prohibition of transactions in child pornography [1] when no actual minors may ****1849** be pictured; instead, it prohibits proposals for transactions in pornography when a defendant manifestly believes or would induce belief in a prospective party that the subject of an exchange or exhibition is or will be an actual child, not an impersonated, simulated or "virtual" one, or the subject of a ***311** composite created from lawful photos spliced together. The Act specifically prohibits three types of those proposals. It outlaws solicitation of child pornography, as well as two distinct kinds of offers: those "advertis[ing]" or "promot[ing]" prosecutable child pornography, which recommend the material with the implication that the speaker can make it available, and those "present[ing]" or "distribut[ing]" such child pornography, which make the material available to anyone who chooses to take it. 18 U.S.C. § 2252A(a)(3)(B) (2000 ed., Supp. V).

1 I use "child pornography" to mean any pornographic representation (such as a photograph, as in this case) that includes what appears to be a child subject. "True" or "real" child pornography refers to images made directly in pornographic settings with models who are minors; "fake" refers to simulations, components of lawful photos spliced together, or those made with adults looking young enough to be mistaken for minors.

The Court holds it is constitutional to prohibit these proposals, and up to a point I do not disagree. In particular, I accept the Court's explanation that Congress may criminalize proposals unrelated to any extant image. I part ways from the Court, however, on the regulation of proposals made with regard to specific, existing representations. Under the new law, the elements of the pandering offense are the same, whether or not the images are of real children. As to those that do not show real children, of course, a transaction in the material could not be prosecuted consistently with the First Amendment, and I believe that maintaining the First Amendment protection of expression we have previously held to cover fake child pornography requires a limit to the law's criminalization of pandering proposals. In failing to confront the tension between ostensibly protecting the material pandered while approving prosecution of the pandering of that same material, and in allowing the new pandering prohibition to suppress otherwise protected speech, the Court undermines *Ferber* and *Free Speech Coalition* in both reasoning and result. This is the significant element of today's holding, and I respectfully dissent from it.

I

The easy case for applying the Act would be a proposal to obtain or supply child pornography supposedly showing a real child, when the solicitation or offer is unrelated to any ***312** image (that is, when the existence of pornographic "material" was merely "purported"). See *ante,* at 1838 ("The statute does not require the actual existence of child pornography"). A proposal speaking of a pornographic photograph of a child is (absent any disclaimer or qualification) understood to mean a photo of an actual child; the reasonable assumption is that people desiring child pornography are not looking for fake child pornography, so that those who speak about it mean the real thing. Hence, someone who seeks to obtain child pornography (having no specific artifact in mind) "solicits" an unlawful transfer of contraband. 18 U.S.C. § 2252A(a)(3)(B). On the other side of that sort of proposed transaction, someone with nothing

to supply or having only nonexpressive matter who purports to present, distribute, advertise, or promote child pornography also proposes an illegal transaction. In both cases, the activity would amount to an offer to traffic in child pornography that may be suppressed, and the First Amendment does not categorically protect offers to engage in illegal transactions. To the extent the speaker intended to mislead others, a conviction would also square with the unprotected status of fraud, see *ante,* at 1842; and even a nonfraudulent speaker ****1850** who mistakenly believed he could obtain the forbidden contraband to transfer to anyone who accepted an offer could be validly convicted consistent with the general rule of criminal law, that attempting to commit a crime is punishable even though the completed crime might (or would) turn out to be impossible in fact, see *ante,* at 1842 – 1843.

The easy cases for constitutional application of the Act are over, however, when one gets to proposals for transactions related to extant pornographic objects, like photos in a dealer's inventory, for example. These will in fact be the common cases, as the legislative findings attest. See §§ 501(1)-(15), 117 Stat. 676–678. Congress did not pass the Act to catch unsuccessful solicitors or fraudulent offerors with no photos to sell; rather, it feared that "[t]he mere prospect that ***313** the technology exists to create composite or computer-generated depictions that are indistinguishable from depictions of real children will allow defendants who possess images of real children to escape prosecution .... This threatens to render child pornography laws that protect real children unenforceable." *Id.,* § 501(13).

A person who "knowingly" proposes a transaction in an extant image incorporates into the proposal an understanding that the subject of the proposal is or includes that image. Cf. *ante,* at 1842 ("['Promotes'] refers to the recommendation of a particular piece of purported child pornography ..."). Congress understood that underlying most proposals there will be an image that shows a child, and the proposal referring to an actual child's picture will thus amount to a proposal to commit an independent crime such as a transfer of child pornography, see 18 U.S.C. §§ 2252A(a)(1), (2). But even when actual pictures thus occasion proposals, the Act requires no finding that an actual child be shown in the pornographic setting in order to prove a violation. And the fair assumption (apparently made by Congress) is that in some instances, the child pornography in question will be fake, with the picture showing only a simulation of a child, for example, or a very young-looking adult convincingly passed off as a child; in those cases the proposal is for a transaction that could not itself be made criminal, because the absence of a child model means that the image is constitutionally protected. See *Free Speech Coalition,* 535 U.S., at 246, 122 S.Ct. 1389. But under the Act, that is irrelevant. What matters is not the inclusion of an actual child in the image, or the validity of forbidding the transaction proposed; what counts is simply the manifest belief or intent to cause a belief that a true minor is shown in the pornographic depiction referred to.

The tension with existing constitutional law is obvious. *Free Speech Coalition* reaffirmed that nonobscene virtual pornographic images are protected, because they fail to trigger the concern for child safety that disentitles child pornography ***314** to First Amendment protection. See *id.,* at 249–251, 122 S.Ct. 1389. The case thus held that pictures without real minors (but only simulations, or young-looking adults) may not be the subject of a nonobscenity pornography crime, *id.,* at 246, 251, 122 S.Ct. 1389, and it has reasonably been taken to mean that transactions in pornographic pictures featuring children may not be punished without proof of real children, see, *e.g., United States v. Salcido,* 506 F.3d 729, 733 (C.A.9 2007) *(per curiam)* ("In *[Free Speech Coalition]*, the Supreme Court held that possession of 'virtual' child pornography cannot constitute a criminal offense. ... As a result, the government has the burden of proving beyond a reasonable doubt that the images were of actual children, not computer-generated images"); cf. *Free Speech Coalition,* ****1851** *supra,* at 255, 122 S.Ct. 1389 ("The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful"). The Act, however, punishes proposals regarding images when the inclusion of actual children is not established by the prosecution, as well as images that show no real children at all; and this, despite the fact that, under *Free Speech Coalition,* the first proposed transfer could not be punished without the very proof the Act is meant to dispense with, and the second could not be made criminal at all.

II

What justification can there be for making independent crimes of proposals to engage in transactions that may include protected materials? The Court gives three answers, none of which comes to grips with the difficulty raised by the question. The first, *ante,* at 1845 – 1846, says it is simply wrong to say that the Act makes it criminal to propose a lawful transaction, since an element of the forbidden proposal must express a belief or inducement to believe that the subject of the proposed transaction shows actual children. But this does not go to the point. The objection is not that the Act criminalizes a proposal for a transaction described as being ***315** in virtual (that is, protected) child pornography. The point is that some proposals made criminal, because they express a belief that they refer to real child pornography, will relate to extant material that does not, or cannot be, demonstrated to show real children and so may not be prohibited. When a proposal covers existing photographs, the Act does not require that the requisite belief (manifested or encouraged) in the reality of the subjects be a correct belief. Prohibited proposals may relate to transactions in lawful, as well as unlawful, pornography.

Much the same may be said about the Court's second answer, that a proposal to commit a crime enjoys no speech protection. *Ante,* at 1841. For the reason just given, that answer does not face up to the source of the difficulty: the action actually contemplated in the proposal, the transfer of the particular image, is not criminal if it turns out that an actual child is not shown in the photograph. If *Ferber* and *Free Speech Coalition* are good law, the facts sufficient for conviction under the Act do not suffice to show that the image (perhaps merely simulated), and thus a transfer of that image, are outside the bounds of constitutional protection. For this reason, it is not enough just to say that the First Amendment does not protect proposals to commit crimes. For that rule rests on the assumption that the proposal is actually to commit a crime, not to do an act that may turn out to be no crime at all. Why should the general rule of unprotected criminal proposals cover a case like the proposal to transfer what may turn out to be fake child pornography?

The Court's third answer analogizes the proposal to an attempt to commit a crime, and relies on the rule of criminal law that an attempt is criminal even when some impediment makes it impossible to complete the criminal act (the possible impediment here being the advanced age, say, or simulated character of the child figure). See *ante,* at 1842 – 1843. Although the actual transfer the speaker has in mind may not turn out to be criminal, the argument goes, the transfer intended ***316** by the speaker is criminal, because the speaker believes [2] that the contemplated transfer ****1852** will be of real child pornography, and transfer of real child pornography is criminal. The fact that the circumstances are not as he believes them to be, because the material does not depict actual minors, is no defense to his attempt to engage in an unlawful transaction.

2 I leave largely aside the case of fraudulent proposals passing off virtual pornography as the real thing. The fact that fraud is a separate category of speech which independently lacks First Amendment protection changes the analysis with regard to such proposals, although it does not necessarily dictate the conclusion. The Court has placed limits on the policing of fraud when it cuts too far into other protected speech. See, *e.g., Riley v. National Federation of Blind of N. C., Inc.,* 487 U.S. 781, 787–795, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988) (invalidating professional fundraiser regulation under strict scrutiny). Also relevant to the analysis would be that the Act is hardly a consumer-protection statute; Congress seems to have cared little for the interests of would-be child pornography purchasers, and the penalties for violating the Act are quite onerous compared with other consumer-protection laws. See Brief for American Booksellers Foundation for Free Expression et al. as *Amici Curiae* 17, and n. 8 (identifying laws punishing fraud as a misdemeanor or with civil penalties). A court could legitimately question whether the unprotected status of fraud enables the Government to punish the transfer of otherwise protected speech with penalties so apparently disproportionate to the harm that fraud is understood to cause.

But invoking attempt doctrine to dispense with *Free Speech Coalition's* real-child requirement in the circumstances of this case is incoherent with the Act, and it fails to fit the paradigm of factual impossibility or qualify for an extended version of that rule. The incoherence of the Court's answer with the scheme of the Act appears from § 2252A(b)(1) (2000 ed., Supp. V), which criminalizes attempting or conspiring to violate the Act's substantive prohibitions, including the pandering provision of § 2252A(a)(3)(B). Treating pandering itself as a species of attempt would thus mean that there is a statutory, inchoate offense of attempting to attempt

to commit a substantive child pornography crime. A metaphysician could imagine a system like this, but the ***317** universe of inchoate crimes is not expandable indefinitely under the actual principles of criminal law, let alone when First Amendment protection is threatened. See 2 W. LaFave, Substantive Criminal Law § 11.2(a), p. 208 (2d ed. 2003) ("[W]here a certain crime is actually defined in terms of either doing or attempting a certain crime, then the argument that there is no crime of attempting this attempt is persuasive").

The more serious failure of the attempt analogy, however, is its unjustifiable extension of the classic factual frustration rule, under which the action specifically intended would be a criminal act if completed. The intending killer who mistakenly grabs the pistol loaded with blanks would have committed homicide if bullets had been in the gun; it was only the impossibility of completing the very intended act of shooting bullets that prevented the completion of the crime. This is not so, however, in the proposed transaction in an identified pornographic image without the showing of a real child; no matter what the parties believe, and no matter how exactly a defendant's actions conform to his intended course of conduct in completing the transaction he has in mind, if there turns out to be reasonable doubt that a real child was used to make the photos, or none was, there could be, respectively, no conviction and no crime. Thus, in the classic impossibility example, there is attempt liability when the course of conduct intended cannot be completed owing to some fact which the defendant was mistaken about, and which precludes completing the intended physical acts. But on the Court's reasoning there would be attempt liability even when the contemplated acts had been completed exactly as intended, but no crime ****1853** had been committed. Why should attempt liability be recognized here (thus making way for "proposal" liability, under the Court's analogy)?

The Court's first response is to demur, with its example of the drug dealer who sells something else. *Ante,* at 1842 – 1843. (A package of baking powder, not powder cocaine, would be an ***318** example.) No one doubts the dealer may validly be convicted of an attempted drug sale even if he did not know it was baking powder he was selling. Yet selling baking powder is no more criminal than selling virtual child pornography.

This response does not suffice, however, because it overlooks a difference between the lawfulness of selling baking powder and the lawful character of virtual child pornography. Powder sales are lawful but not constitutionally privileged. Any justification within the bounds of rationality would suffice for limiting baking powder transactions, just as it would for regulating the discharge of blanks from a pistol. Virtual pornography, however, has been held to fall within the First Amendment speech privilege, and thus is affirmatively protected, not merely allowed as a matter of course. The question stands: why should a proposal that may turn out to cover privileged expression be subject to standard attempt liability?

The Court's next response deals with the privileged character of the underlying material. It gives another example of attempt that presumably could be made criminal, in the case of the mistaken spy, who passes national security documents thinking they are classified and secret, when in fact they have been declassified and made subject to public inspection. *Ante,* at 1845. Publishing unclassified documents is subject to the First Amendment privilege and can claim a value that fake child pornography cannot. The Court assumes that the document publication may be punished as an attempt to violate state-secret restrictions (and I assume so too); then why not attempt proposals based on a mistaken belief that the underlying material is real child pornography? As the Court looks at it, the deterrent value that justifies prosecuting the mistaken spy (like the mistaken drug dealer and the intending killer) would presumably validate prosecuting those who make proposals about fake child pornography. But it would not, for there are significant differences ***319** between the cases of security documents and pornography without real children.

Where Government documents, blank cartridges, and baking powder are involved, deterrence can be promoted without compromising any other important policy, which is not true of criminalizing mistaken child pornography proposals. There are three dispositive differences. As for the first, if the law can criminalize proposals for transactions in fake as well as true child pornography as if they were like attempts to sell cocaine that turned out to be baking powder, constitutional law will lose something sufficiently important to have made it into multiple holdings of this Court, and that is the line between child pornography that may be suppressed and

fake child pornography that falls within First Amendment protection. No one can seriously assume that after today's decision the Government will go on prosecuting defendants for selling child pornography (requiring a showing that a real child is pictured, under *Free Speech Coalition,* 535 U.S., at 249–251, 122 S.Ct. 1389); it will prosecute for merely proposing a pornography transaction manifesting or inducing the belief that a photo is real child pornography, free of any need to demonstrate that any extant underlying photo does show a real child. If the Act can be enforced, it will function just as it was meant to do, by merging the whole subject ****1854** of child pornography into the offense of proposing a transaction, dispensing with the real-child element in the underlying subject. And eliminating the need to prove a real child will be a loss of some consequence. This is so not because there will possibly be less pornography available owing to the greater ease of prosecuting, but simply because there must be a line between what the Government may suppress and what it may not, and a segment of that line will be gone. This Court went to great pains to draw it in *Ferber* and *Free Speech Coalition*; it was worth drawing and it is worth respecting now in facing the attempt to end-run that line through the provisions of the Act.

***320** The second reason for treating child pornography differently follows from the first. If the deluded drug dealer is held liable for an attempt crime there is no risk of eliminating baking powder from trade in lawful commodities. Likewise, if the mistaken spy is convicted of attempting to disclose classified national security documents there will be no worry that lawful speech will be suppressed as a consequence; any unclassified documents in question can be quoted in the newspaper, other unclassified documents will circulate, and analysts of politics and foreign policy will be able to rely on them. But if the Act can effectively eliminate the real-child requirement when a proposal relates to extant material, a class of protected speech will disappear. True, what will be lost is short on merit, but intrinsic value is not the reason for protecting unpopular expression.

Finally, if the Act stands when applied to identifiable, extant pornographic photographs, then in practical terms *Ferber* and *Free Speech Coalition* fall. They are left as empty as if the Court overruled them formally, and when a case as well considered and as recently decided as *Free Speech Coalition* is put aside (after a mere six years) there ought to be a very good reason. Another pair of First Amendment cases come to mind, compare *Minersville School Dist. v. Gobitis,* 310 U.S. 586, 60 S.Ct. 1010, 84 L.Ed. 1375 (1940), with *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). In *Barnette,* the Court set out the reason for its abrupt turn in overruling *Gobitis* after three years, 319 U.S., at 635–642, 63 S.Ct. 1178, but here nothing is explained. Attempts with baking powder and unclassified documents can be punished without damage to confidence in precedent; suppressing protected pornography cannot be.

These differences should be dispositive. Eliminating the line between protected and unprotected speech, guaranteeing the suppression of a category of expression previously protected, and reducing recent and carefully considered First Amendment precedents to empty shells are heavy prices, not to be paid without a substantial offset, which is ***321** missing from this case. Hence, my answer that there is no justification for saving the Act's attempt to get around our holdings. We should hold that a transaction in what turns out to be fake pornography is better understood, not as an incomplete attempt to commit a crime, but as a completed series of intended acts that simply do not add up to a crime, owing to the privileged character of the material the parties were in fact about to deal in.

The upshot is that there ought to be no absolute rule on the relationship between attempt liability and a frustrating mistake. Not all attempts frustrated by mistake should be punishable, and not all mistaken assumptions that expressive material is unprotected should bar liability for attempts to commit a crime. The legitimacy of attempt liability should turn on its consequences for protected expression and the ****1855** law that protects it. When, as here, a protected category of expression would inevitably be suppressed and its First Amendment safeguard left pointless, the Government has the burden to justify this damage to free speech.

III

Untethering the power to suppress proposals about extant pornography from any assessment of the likely effects the proposals might have has an unsettling significance well beyond the subject of child pornography. For the

Court is going against the grain of pervasive First Amendment doctrine that tolerates speech restriction not on mere general tendencies of expression, or the private understandings of speakers or listeners, but only after a critical assessment of practical consequences. Thus, one of the milestones of American political liberty is *Brandenburg v. Ohio,* 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) *(per curiam),* which is seen as the culmination of a half century's development that began with Justice Holmes's dissent in *Abrams v. United States,* 250 U.S. 616, 40 S.Ct. 17, 63 L.Ed. 1173 (1919). In place of the rule that dominated the First World War sedition and espionage cases, allowing suppression of speech for ***322** its tendency and the intent behind it, see *Schenck v. United States,* 249 U.S. 47, 52, 39 S.Ct. 247, 63 L.Ed. 470 (1919), *Brandenburg* insisted that

> "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U.S., at 447, 89 S.Ct. 1827.

See also G. Stone, Perilous Times: Free Speech in Wartime 522 (2004) ("[E]xactly fifty years after *Schenck,* the Supreme Court finally and unambiguously embraced the Holmes–Brandeis version of clear and present danger").

Brandenburg unmistakably insists that any limit on speech be grounded in a realistic, factual assessment of harm. This is a far cry from the Act before us now, which rests criminal prosecution for proposing transactions in expressive material on nothing more than a speaker's statement about the material itself, a statement that may disclose no more than his own belief about the subjects represented or his desire to foster belief in another. This should weigh heavily in the overbreadth balance, because "First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought." *Free Speech Coalition,* 535 U.S., at 253, 122 S.Ct. 1389. See also *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U.S. 557, 579, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) ("The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis").

***323** IV

I said that I would not pay the price enacted by the Act without a substantial justification, which I am at a loss to find here. I have to assume that the Court sees some grounding for the Act that I do not, however, and I suppose the holding can only be explained as an uncritical acceptance ****1856** of a claim made both to Congress and to this Court. In each forum the Government argued that a jury's appreciation of the mere possibility of simulated or virtual child pornography will prevent convictions for the real thing, by inevitably raising reasonable doubt about whether actual children are shown. The Government voices the fear that skeptical jurors will place traffic in child pornography beyond effective prosecution unless it can find some way to avoid the *Ferber* limitation, skirt *Free Speech Coalition,* and allow prosecution whether pornography shows actual children or not.

The claim needs to be taken with a grain of salt. There has never been a time when some such concern could not be raised. Long before the Act was passed, for example, pornographic photos could be taken of models one day into adulthood, and yet there is no indication that prosecution has ever been crippled by the need to prove young-looking models were underage.

Still, if I were convinced there was a real reason for the Government's fear stemming from computer simulation, I would be willing to reexamine *Ferber.* Conditions can change, and if today's technology left no other effective way to stop professional and amateur pornographers from exploiting children there would be a fair claim that some degree of expressive protection had to yield to protect the children.

But the Government does not get a free pass whenever it claims a worthy objective for curtailing speech, and I have further doubts about the need claimed here. Although Congress found that child pornography defendants "almost universally ***324** rais[e]" the defense that the alleged child pornography could be simulated or virtual, § 501(10), 117 Stat. 677, neither Congress nor this Court has been given the citation to a single case in which a

defendant's acquittal is reasonably attributable to that defense.[3] See Brief for Free Speech Coalition ***325** et al. as *Amici Curiae* 21–23; ****1857** Brief for National Law Center for Children and Families et al. as *Amici Curiae* 10–13. The Government thus seems to be selling itself short; it appears to be highly successful in convicting child pornographers, the overwhelming majority of whom plead guilty rather than try their luck before a jury with a virtual-child defense.[4] And little seems to have changed since the time ***326** of ****1858** *Free Speech Coalition,* when the Court rejected an assertion of the same interest. See 535 U.S., at 254–255, 122 S.Ct. 1389 ("[T]he Government says that the possibility of producing images by using computer imaging makes it very difficult for it to prosecute those who produce pornography by using real children .... The necessary solution, the argument runs, is to prohibit both kinds of images. The argument, in essence, is that protected speech may be banned as a means to ban unprotected speech. This analysis turns the First Amendment upside down"); *id.,* at 259, 122 S.Ct. 1389 (THOMAS, J., concurring in judgment) ("At this time ... the Government asserts only that defendants *raise* such defenses, not that they have done so successfully. In fact, the Government points to no case in which a defendant has been acquitted based on a 'computer-generated images' defense").

3 During hearings prior to passage of the Act, the Department of Justice presented Congress with three examples of prosecutions purportedly frustrated by a virtual-child defense. See Hearing on H.R. 1104 and H.R. 1161 before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary, 108th Cong., 1st Sess., 9 (2003) (statement of Daniel P. Collins, Associate Deputy Attorney General). In *United States v. Bunnell,* No. CRIM.02–13–B–S, 2002 WL 927765 (D.Me., May 1, 2002), the court allowed the defendant to withdraw his guilty plea after the *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002), decision. The defendant did not, however, present a virtual-child defense to a jury, nor was he acquitted; indeed the court rejected his motion to dismiss, see Criminal Docket for Case No. 1:02CR00013 (D.Me.). (The docket report also indicates that the defendant's trial was then continued during his prosecution in state court, with the Government moving to dismiss upon receipt of a judgment and commitment from the state court. See *ibid.*)

In *United States v. Reilly,* No. 01 CR. 1114(RPP), 2002 WL 31307170 (S.D.N.Y., Oct.15, 2002), the court also allowed a defendant to withdraw a guilty plea after the issuance of *Free Speech Coalition,* because his plea was founded on a belief that the Government need not prove the involvement of actual children in the material at issue. (After the time of the congressional hearings, the court dismissed the child pornography charges upon the Government's motion, and the defendant was convicted on multiple counts of transportation of obscene material under 18 U.S.C. § 1462. See Criminal Docket for Case No. 1:01CR01114 (SDNY).)

In *United States v. Sims,* 220 F.Supp.2d 1222 (D.N.M.2002), the defendant was convicted after a jury trial at which the Government contended, and the court agreed, that it did not bear the burden of proving that the images at issue depicted actual minors. The *Free Speech Coalition* decision came down soon afterward, and the defendant filed a post-trial motion for acquittal. The trial court held that the Government did bear the burden of proof and had met it with regard to one count but not with regard to another, upon which it had presented no evidence of the use of actual children. The trial court acquitted the defendant on the latter count, observing that "[t]he government could have taken a more cautionary approach and presented evidence to prove the use of actual children, but it made the strategic decision not to do so." 220 F.Supp.2d, at 1227. The Government did not seek review of this ruling on appeal.

In short, all of the cases presented to Congress involved the short-term transition on the burden-of-proof issue occasioned by the *Free Speech Coalition* decision; none of them involved a jury or judge's acquittal of a defendant on the basis of a virtual-child defense.

Nor do the Government's *amici* identify other successful employments of a virtual-child defense. One *amicus* says that *Free Speech Coalition* spawned serious prosecutorial problems, but the only example it gives of an acquittal is a defendant's partial acquittal in an Ohio bench trial under an Ohio statute, where the judge convicted the defendant of counts involving images for which the prosecution presented expert testimony of the minor's identity and acquitted him of counts for which it did not. See Brief for National Law Center for Children and Families et al. as *Amici Curiae* 11 (citing *State v. Tooley,* No.2004–P–0064, 2005–Ohio–6709, 2005 WL 3476649 (App., Dec. 16, 2005)). The State apparently did not cross-appeal the acquittals, but in considering defendant's appeal of his convictions, the Supreme Court of Ohio held

that his hearsay objection to the Government's expert was irrelevant, because "*[Free Speech Coalition]* did not impose a heightened evidentiary burden on the state to specifically identify the child or to use expert testimony to prove that the image contains a real child." 114 Ohio St.3d 366, 381, 2007–Ohio–3698, 872 N.E.2d 894, 908 (2007). Rather, "[t]he fact-finder in this case, the trial judge, was capable of reviewing the evidence to determine whether the state met its burden of showing that the images depicted real children." *Id.,* at 382, 872 N.E.2d, at 909. The case hardly bespeaks a prosecutorial crisis.

4 According to the U.S. Department of Justice Bureau of Justice Statistics, in the 1,209 federal child pornography cases concluded in 2006, 95.1% of defendants were convicted. Bureau of Justice Statistics Bulletin, Federal Prosecution of Child Sex Exploitation Offenders, 2006, p. 6 (Dec.2007), online at http://www.ojp.usdoj.gov/bjs/ pub/pdf/ fpcseo06.pdf (as visited May 8, 2008, and available in Clerk of Court's case file). By comparison, of the 161 child pornography cases concluded in 1996, 96.9% of defendants were convicted. *Ibid.* Of the 2006 cases, 92.2% ended with a plea. *Ibid.* The 4.9% of defendants not convicted in 2006 was made up of 4.5% whose charges were dismissed, and only 0.4% who were not convicted at trial. *Ibid.*

Nor do the statistics suggest a crisis in the ability to prosecute. In 2,376 child pornography matters concluded by U.S. Attorneys in 2006, 58.5% of them were prosecuted, while 37.8% were declined for prosecution, and 3.7% were disposed by a U.S. magistrate judge. *Id.,* at 2. By comparison, the prosecution rate for all matters concluded by U.S. Attorneys in 2006 was 59%. *Ibid.* Nor did weak evidence make up a disproportionate part of declined prosecutions. Of the child pornography cases declined for prosecution, 24.3% presented problems of weak or inadmissible evidence; 22.7% were declined for lack of evidence of criminal intent; and in 18.7% the suspects were prosecuted on other charges. *Id.,* at 3. In comparison, weak or inadmissible evidence accounted for 53% of declined prosecutions for sex abuse and 20.4% for sex transportation, both sexual exploitation crimes which do not easily admit of a virtual-child defense. *Ibid.*

None of these data, to be sure, isolates the experience between *Free Speech Coalition* and the current Act, or breaks down the post-Act numbers by reference to prosecution under the Act. If the generality of the statistics is a problem, however, it is for the Government, which makes the necessity claim.

Without some convincing evidence to the contrary, experience tells us to have faith in the capacity of the jury system, which I would have expected to operate in much the following ***327** way, if the Act were not on the books. If the Government sought to prosecute proposals about extant images as attempts, it would seek to carry its burden of showing that real children were depicted in the image subject to the proposal simply by introducing the image into evidence; if the figures in the picture looked like real children, the Government would have made its prima facie demonstration on that element. [5] The defense might well offer expert testimony to the effect that technology can produce convincing simulations, but if this was the extent of the testimony that came in, the cross-examination would ask whether the witness could say that this particular, seemingly authentic representation was merely simulated. If the witness could say that (or said so on direct), and survived further questioning about the basis for the opinion and its truth, acquittal would have been proper; the defendant would have raised reasonable doubt about whether a child had been victimized (the same standard that would govern if the defendant were on trial for abusing a child personally). But if the defense had no specific evidence that the particular image failed to show actual children, I am skeptical that a jury would have been likely to entertain reasonable doubt that the image showed a real child.

5 The Courts of Appeals to consider the issue have declined to require expert evidence to prove the authenticity of images, generally finding the images themselves sufficient to prove the depiction of actual minors. See, *e.g., United States v. Salcido,* 506 F.3d 729, 733–734 (C.A.9 2007) *(per curiam)* (collecting cases).

Perhaps I am wrong, but without some demonstration that juries have been rendering exploitation of children unpunishable, there is no excuse for cutting back on the First Amendment and no alternative to finding overbreadth in this Act. I would hold it unconstitutional on the authority of *Ferber* and *Free Speech Coalition.*

All Citations

553 U.S. 285, 128 S.Ct. 1830, 170 L.Ed.2d 650, 76 USLW 4275, 08 Cal. Daily Op. Serv. 5989, 2008 Daily Journal D.A.R. 7227, 21 Fla. L. Weekly Fed. S 238

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KeyCite Yellow Flag - Negative Treatment
Abrogation Recognized by State v. Claiborne, Idaho, May 8, 1991

93 S.Ct. 2607
Supreme Court of the United States

Marvin MILLER, Appellant,
v.
State of CALIFORNIA.

No. 70—73.
|
Argued Jan. 18—19, 1972.
|
Reargued Nov. 7, 1972.
|
Decided June 21, 1973.
|
Rehearing Denied Oct. 9, 1973.

Synopsis
See 414 U.S. 881, 94 S.Ct. 26.

Defendant was convicted of mailing unsolicited sexually explicit material in violation of a California statute and the Appellate Department, Superior Court of California, County of Orange, affirmed and defendant appealed. The Supreme Court, Mr. Chief Justice Burger, held that a work may be subject to state regulation where that work, taken as a whole, appeals to the prurient interest in sex; portrays, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and, taken as a whole, does not have serious literary, artistic, political or scientific value. The Court also rejected the test of 'utterly without redeeming social value' as a constitutional standard.

Vacated and remanded.

Mr. Justice Douglas filed a dissenting opinion.

Mr. Justice Brennan filed a dissenting opinion in which Mr. Justice Stewart and Mr. Justice Marshall joined.

West Headnotes (22)

[1] Constitutional Law
Freedom of Speech, Expression, and Press
Constitutional Law
Politics and Elections

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1490 In general
(Formerly 92k90(3))
92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(F) Politics and Elections
92k1680 In general
(Formerly 92k90(3))

In the area of freedom of speech and press, the courts must remain sensitive to any infringement on genuinely serious literary, artistic, political or scientific expression. U.S.C.A.Const. Amend. 1.

11 Cases that cite this headnote

[2] Constitutional Law
Lack of constitutional protection

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2189 Obscenity in General
92k2191 Lack of constitutional protection
(Formerly 92k90.4(1), 92k90.1(1))

Obscene material is unprotected by the First Amendment. U.S.C.A.Const. Amend. 1.

71 Cases that cite this headnote

[3] Obscenity
Publications in general

281 Obscenity
281I In General
281k107 Constitutional, Statutory, and Regulatory Provisions
281k112 Validity of Statutes, Ordinances, and Regulations
281k112(7) Publications in general
(Formerly 281k2.1, 281k2)

State statutes designed to regulate obscene material must be carefully limited. U.S.C.A.Const. Amend. 1.

3 Cases that cite this headnote

[4] **Constitutional Law**
Sexual Expression

Obscenity
Publications in general

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2180 In general
(Formerly 92k90.4(2), 92k90.1(1))
281 Obscenity
281I In General
281k107 Constitutional, Statutory, and Regulatory Provisions
281k112 Validity of Statutes, Ordinances, and Regulations
281k112(7) Publications in general
(Formerly 281k2.1, 110k13.1(13))

Permissible scope of regulation of any form of expression is confined to works which depict or describe sexual conduct, and that conduct must be specifically defined by the applicable state law, as written or authoritatively construed. U.S.C.A.Const. Amend. 1.

108 Cases that cite this headnote

[5] **Constitutional Law**
Depictions or portrayals of sex or nudity in general

Obscenity
Definitions;Test for Obscenity

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2184 Depictions or portrayals of sex or nudity in general
(Formerly 92k90.4(2), 92k90.1(1))
281 Obscenity
281I In General
281k101 Definitions;Test for Obscenity
281k102 In general
(Formerly 281k1.1, 281k1, 281k5)

Regulation of works which depict or describe sexual conduct must be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political or scientific value. U.S.C.A.Const. Amend. 1.

697 Cases that cite this headnote

[6] **Obscenity**
Definitions;Test for Obscenity

281 Obscenity
281I In General
281k101 Definitions;Test for Obscenity
281k102 In general
(Formerly 281k1.4, 281k5)

Basic guidelines for trier of fact in determining whether a work which depicts or describes sexual conduct is obscene is whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. U.S.C.A.Const. Amend. 1.

654 Cases that cite this headnote

[7] **Constitutional Law**
Obscenity in General

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2189 Obscenity in General
92k2190 In general
(Formerly 92k90.4(2), 92k90.1(1))

The “utterly without redeeming social value” test is not the constitutional standard for determining whether a work which depicts or describes sexual conduct is obscene, nor is the concept of “social importance” the constitutional standard to be applied. U.S.C.A.Const. Amend. 1.

28 Cases that cite this headnote

[8] **Constitutional Law**
Obscenity in general
Constitutional Law
First Amendment

92 Constitutional Law
92X First Amendment in General
92X(B) Particular Issues and Applications
92k1172 Sex in General
92k1174 Obscenity in general
(Formerly 92k274.1(3))
92 Constitutional Law
92XXVII Due Process
92XXVII(A) In General
92k3848 Relationship to Other Constitutional Provisions;Incorporation
92k3851 First Amendment
(Formerly 92k274.1(3))

If a state law that regulates obscene material is limited to works which the average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest and which depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and which, taken as a whole, lacks serious, artistic, political, or scientific value, the First Amendment values applicable to the states through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary. U.S.C.A.Const. Amends. 1, 14.

972 Cases that cite this headnote

[9] **Courts**
Suits involving validity or construction of state statutes

106 Courts
106VII Concurrent and Conflicting Jurisdiction
106VII(B) State Courts and United States Courts
106k489 Exclusive or Concurrent Jurisdiction
106k489(2) Suits involving validity or construction of state statutes

It is not function of the United States Supreme Court to propose regulatory schemes for the states with respect to obscene material.

29 Cases that cite this headnote

[10] **Obscenity**
Power to regulate

281 Obscenity
281I In General
281k107 Constitutional, Statutory, and Regulatory Provisions
281k111 Power to regulate
(Formerly 281k2.1, 281k2)

A state statute may define for regulation patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated and patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals. U.S.C.A.Const. Amend. 1.

131 Cases that cite this headnote

[11] **Constitutional Law**
Depictions or portrayals of sex or nudity in general

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2184 Depictions or portrayals of sex or nudity in general
(Formerly 92k90.4(1), 92k90.1(1))

States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior. U.S.C.A.Const. Amend. 1.

18 Cases that cite this headnote

[12] **Constitutional Law**
Obscenity in General

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2189 Obscenity in General

92k2190 In general
(Formerly 92k90.4(1), 92k90.1(1))
At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit the First Amendment protection. U.S.C.A.Const. Amend. 1.

268 Cases that cite this headnote

[13] **Constitutional Law**
Obscenity in General
92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2189 Obscenity in General
92k2190 In general
(Formerly 92k90.4(1), 92k90.1(1))
The mere fact juries may reach different conclusions on issues of prurient appeal and patent offensiveness as to the same material does not mean that constitutional rights are abridged. U.S.C.A.Const. Amend. 1.

11 Cases that cite this headnote

[14] **Obscenity**
Sex and nudity
281 Obscenity
281I In General
281k101 Definitions;Test for Obscenity
281k103 Sex and nudity
(Formerly 281k1.1, 281k1, 281k5)
No one is subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed. U.S.C.A.Const. Amends. 1, 14.

124 Cases that cite this headnote

[15] **Constitutional Law**
Obscenity in General
92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2189 Obscenity in General
92k2190 In general
(Formerly 92k90.4(1), 92k90.1(1))
Fact that fundamental First Amendment limitations on powers of the states do not vary from community to community does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the "prurient interest" or is "patently offensive." U.S.C.A.Const. Amend. 1.

109 Cases that cite this headnote

[16] **Criminal Law**
Knowledge, Experience, and Skill
110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k477 Competency of Experts
110k478 Knowledge, Experience, and Skill
110k478(1) In general
Police officer with many years of specialization in obscenity cases and who had conducted an extensive statewide survey and given expert evidence on 26 occasions in the year prior to defendant's trial for mailing unsolicited sexually explicit material in violation of California statute was qualified to give evidence on California "community standards." West's Ann.Cal.Pen.Code, §§ 311, 311.2(a); U.S.C.A.Const. Amends. 1, 14.

19 Cases that cite this headnote

[17] **Constitutional Law**
Sexual Expression
Postal Service
Trial and review
92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2180 In general
(Formerly 92k90.4(1), 92k90.1(1))
306 Postal Service
306III Offenses Against Postal Laws
306k50 Trial and review
(Formerly 281k20)

Neither the state's alleged failure to offer evidence of "national standards," nor the trial court's charge that the jury consider state community standards, were constitutional errors in trial on charge of mailing unsolicited sexually explicit material in violation of California statute. West's Ann.Cal.Pen.Code, §§ 311, 311.2(a); U.S.C.A.Const. Amends. 1, 14.

106 Cases that cite this headnote

[18] **Commerce**
Obscenity

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(K) Miscellaneous Subjects and Regulations
83k82.55 Obscenity
(Formerly 83k82, 83k16)

Application of domestic state police powers in regulation of sexually explicit materials did not intrude on any congressional powers under the commerce clause in absence of any indication that the unsolicited sexually explicit materials mailed by defendant were ever distributed interstate. West's Ann.Cal.Pen.Code, §§ 311, 311.2(a); U.S.C.A.Const. art. 1, § 8, cl. 3.

2 Cases that cite this headnote

[19] **Commerce**
Obscenity

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(K) Miscellaneous Subjects and Regulations
83k82.55 Obscenity
(Formerly 83k8(21))

Obscene material may be validly regulated by a state in the exercise of its traditional local power to protect the general welfare of its population despite some possible incidental effect on the flow of such materials across state lines. U.S.C.A.Const. art. 1, § 8, cl. 3.

5 Cases that cite this headnote

[20] **Obscenity**
Contemporary community standards

281 Obscenity
281I In General
281k101 Definitions;Test for Obscenity
281k105 Contemporary community standards
(Formerly 281k1.4, 281k5)

The primary concern with requiring a jury in an obscenity case to apply the standard of "the average person, applying contemporary community standards" is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person, or a totally insensitive one. U.S.C.A.Const. Amends. 1, 14.

81 Cases that cite this headnote

[21] **Constitutional Law**
Obscenity in General

Obscenity
Contemporary community standards

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2189 Obscenity in General
92k2190 In general
(Formerly 92k90.4(1), 92k90.1(1))
281 Obscenity
281I In General
281k101 Definitions;Test for Obscenity
281k105 Contemporary community standards
(Formerly 281k1.4, 281k5)

Requirement that jury evaluate sexually explicit materials with reference to contemporary state standards serves protective purpose that material will be judged by its impact on an average person and is constitutionally adequate. U.S.C.A.Const. Amends. 1, 14.

84 Cases that cite this headnote

[22] **Criminal Law**

Defenses

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)4 Scope of Inquiry
110k1134.33 Defenses
(Formerly 110k1134(3))

Contention that defendant convicted of mailing unsolicited sexually explicit material in violation of California statute was subjected to "double jeopardy" because a Los Angeles County trial judge dismissed, before trial, a prior prosecution based on the same brochures and that state was "collaterally estopped" from ever alleging the material to be obscene was a matter best left to the California courts and, in any event, was not a proper subject for appeal. West's Ann.Cal.Pen.Code, §§ 311, 311.2(a).

51 Cases that cite this headnote

****2610** *Syllabus* *

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***15** Appellant was convicted of mailing unsolicited sexually explicit material in violation of a California statute that approximately incorporated the obscenity test formulated in Memoirs v. Massachusetts, 383 U.S. 413, 418, 86 S.Ct. 975, 977, 16 L.Ed.2d 1 (plurality opinion). The trial court instructed the jury to evaluate the materials by the contemporary community standards of California. Appellant's conviction was affirmed on appeal. In lieu of the obscenity criteria enunciated by the Memoirs plurality, it is held:

1. Obscene material is not protected by the First Amendment. Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498, reaffirmed. A work may be subject to state regulation where that work, taken as a whole, appeals to the prurient interest in sex; portrays, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and, taken as a whole, does not have serious literary, artistic, political, or scientific value. P. 2614.

2. The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, Roth supra, at 489, 77 S.Ct. at 1311, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. If a state obscenity law is thus limited, First Amendment values are adequately protected by ultimate independent appellate review of constitutional claims when necessary. P. 2615.

3. The test of 'utterly without redeeming social value' articulated in Memoirs, supra, is rejected as a constitutional standard. P. 2615.

4. The jury may measure the essentially factual issues of prurient appeal and patent offensiveness by the standard that prevails in the forum community, and need not employ a 'national standard.' Pp. 2618—2620.

Vacated and remanded.

Attorneys and Law Firms

***16** Burton Marks, Beverly Hills, Cal., for appellant.

Michael R. Capizzi, Santa Ana, Cal., for appellee.

Opinion

Mr. Chief Justice BURGER delivered the opinion of the Court.

This is one of a group of 'obscenity-pornography' cases being reviewed by the Court in a re-examination of standards enunciated in earlier cases involving what Mr. Justice Harlan called 'the intractable obscenity problem.' ****2611** Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704, 88 S.Ct. 1298, 1313, 20 L.Ed.2d 225 (1968) (concurring and dissenting).

Appellant conducted a mass mailing campaign to advertise the sale of illustrated books, euphemistically called 'adult' material. After a jury trial, he was convicted of violating California Penal Code s 311.2(a),

a misdemeanor, by knowingly distributing obscene matter,[1] *17 and the Appellate Department, Superior Court of California, County of Orange, summarily affirmed the judgment without opinion. Appellant's conviction was specifically *18 based on his conduct in causing five unsolicited advertising brochures to be sent through the mail in an envelope addressed to a restaurant in Newport Beach, California. The envelope was opened by the manager of the restaurant and his mother. They had not requested the brochures; they complained to the police.

1 At the time of the commission of the alleged offense, which was prior to June 25, 1969, ss 311.2(a) and 311 of the California Penal Code read in relevant part:
's 311.2 Sending or bringing into state for sale or distribution; printing, exhibiting, distributing or possessing within state
'(a) Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor. . . .'
's 311. Definitions
'As used in this chapter:
'(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.
'(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial represention or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.
'(c) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.
'(d) 'Distribute' means to transfer possession of, whether with or without consideration.
'(e) 'Knowingly' means having knowledge that the matter is obscene.'
Section 311(e) of the California Penal Code, supra, was amended on June 25, 1969, to read as follows:
'(e) 'Knowingly' means being aware of the character of the matter.'
Cal.Amended Stats.1969, c. 249, s 1, p. 598. Despite appellant's contentions to the contrary, the record indicates that the new s 311(e) was not applied ex post facto to his case, but only the old s 311(e) as construed by state decisions prior to the commission of the alleged offense. See People v. Pinkus, 256 Cal.App.2d Supp. 941, 948—950, 63 Cal.Rptr. 680, 685—686 (App.Dept., Superior Ct., Los Angeles, 1967); People v. Campise, 242 Cal.App.2d Supp. 905, 914, 51 Cal.Rptr. 815, 821 (App.Dept., Superior Ct. San Diego, 1966). Cf. Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964). Nor did s 311.2, supra, as applied, create any 'direct, immediate burden on the performance of the postal functions,' or infringe on congressional commerce powers under Art. I, s 8, cl. 3. Roth v. United States, 354 U.S. 476, 494, 77 S.Ct. 1304, 1314, 1 L.Ed.2d 1498 (1957), quoting Railway Mail Assn. v. Corsi, 326 U.S. 88, 96, 65 S.Ct. 1483, 1488, 89 L.Ed. 2072 (1945). See also Mishkin v. New York, 383 U.S. 502, 506, 86 S.Ct. 958, 962, 16 L.Ed.2d 56 (1966); Smith v. California, 361 U.S. 147, 150—152, 80 S.Ct. 215, 217—218, 4 L.Ed.2d 205 (1959).

The brochures advertise four books entitled 'Intercourse,' 'Man-Woman,' 'Sex Orgies Illustrated,' and 'An Illustrated History of Pornography,' and a film entitled 'Marital Intercourse.' While the brochures contain some descriptive printed material, primarily they consist of pictures and drawings very explicitly depicting men and women **2612 in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed.

I

This case involves the application of a State's criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials. This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material[2] *19 when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles. Stanley v. Georgia, 394 U.S. 557, 567, 89 S.Ct. 1243, 1249, 22 L.Ed.2d 542 (1969); Ginsberg v. New York, 390 U.S. 629, 637—643, 88 S.Ct. 1274, 1279—1282, 20 L.Ed.2d 195 (1968); Interstate Circuit, Inc. v. Dallas, supra, 390 U.S.,

at 690, 88 S.Ct., at 1306; Redrup v. New York, 386 U.S. 767, 769, 87 S.Ct., 1414, 1415, 18 L.Ed.2d 515 (1967); Jacobellis v. Ohio, 378 U.S. 184, 195, 84 S.Ct. 1676, 1682, 12 L.Ed.2d 793 (1964). See Rabe v. Washington, 405 U.S. 313, 317, 92 S.Ct. 993, 995, 31 L.Ed.2d 258 (1972) (Burger, C.J., concurring); United States v. Reidel, 402 U.S. 351, 360—362, 91 S.Ct. 1410, 1414—1415, 28 L.Ed.2d 813 (1971) (opinion of Marshall, J.); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502, 72 S.Ct. 777, 780, 96 L.Ed. 1098 (1952); Breard v. Alexandria, 341 U.S. 622, 644—645, 71 S.Ct. 920, 933—934, 95 L.Ed. 1233 (1951); Kovacs v. Cooper, 336 U.S. 77, 88—89, 69 S.Ct. 448, 454, 93 L.Ed. 513 (1949); Prince v. Massachusetts, 321 U.S. 158, 169—170, 64 S.Ct. 438, 443—444, 88 L.Ed. 645 (1944). Cf. Butler v. Michigan, 352 U.S. 380, 382—383, 77 S.Ct. 524, 525, 1 L.Ed.2d 412 (1957); Public Utilities Comm'n v. Pollak, 343 U.S. 451, 464—465, 72 S.Ct. 813, 821—822, 96 L.Ed. 1068 (1952). It is in this context that we are called ***20** on to define the standards which must be used to identify obscene material that a State may regulate without infringing on the First Amendment as applicable to the States through the Fourteenth Amendment.

2 This Court has defined 'obscene material' as 'material which deals with sex in a manner appealing to prurient interest,' Roth v. United States, supra, 354 U.S., at 487, 77 S.Ct., at 1310, but the Roth definition does not reflect the precise meaning of 'obscene' as traditionally used in the English language. Derived from the Latin obscaenus, ob, to, plus caenum, filth, 'obscene' is defined in the Webster's Third New International Dictionary (Unabridged 1969) as '1a: disgusting to the senses . . . b: grossly repugnant to the generally accepted notions of what is appropriate . . . 2: offensive or revolting as countering or violating some ideal or principle.' The Oxford English Dictionary (1933 ed.) gives a similar definition, '(o)ffensive to the senses, or to taste or refinement, disgusting, repulsive, filthy, foul, abominable, loathsome.'

The material we are discussing in this case is more accurately defined as 'pornography' or 'pornographic material.' 'Pornography' derives from the Greek (porne, harlot, and graphos, writing). The word now means '1: a description of prostitutes or prostitution 2: a depiction (as in writing or painting) of licentiousness or lewdness: a a portrayal of erotic behavior designed to cause sexual excitement.' Webster's Third New International Dictionary, supra. Pornographic material which is obscene forms a subgroup of all 'obscene' expression, but not the whole, at least as the word 'obscene' is now used in our language. We note, therefore, that the words 'obscene material,' as used in this case, have a specific judicial meaning which derives from the Roth case, i.e., obscene material 'which deals with sex.' Roth, supra, at 487, 77 S.Ct., at 1310. See also ALI Model Penal Code s 251.4(l) 'Obscene Defined.' (Official Draft, 1962.)

The dissent of Mr. Justice BRENNAN reviews the background of the obscenity problem, but since the Court now undertakes to formulate standards more concrete than those in the past, it is useful for us to focus on two of the landmark cases in the somewhat tortured ****2613** history of the Court's obscenity decisions. In Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), the Court sustained a conviction under a federal statute punishing the mailing of 'obscene, lewd, lascivious or filthy . . .' materials. The key to that holding was the Court's rejection of the claim that obscene materials were protected by the First Amendment. Five Justices joined in the opinion stating:

'All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the (First Amendment) guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . . . This is the same judgment expressed by this Court in Chaplinsky v. New Hampshire, 315 U.S. 568, 571—572, 62 S.Ct. 766, 768—769, 86 L.Ed. 1031:

"... There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . .. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social ***21** value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .' (Emphasis by Court in Roth opinion.)

'We hold that obscenity is not within the area of constitutionally protected speech or press.' 354 U.S., at 484—485, 77 S.Ct., 1309 (footnotes omitted).

Nine years later, in Memoirs v. Massachusetts, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966), the Court veered sharply away from the Roth concept and, with only three Justices in the plurality opinion, articulated a new test of obscenity. The plurality held that under the Roth definition

'as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because if affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.' Id., at 418, 86 S.Ct., at 977.

The sharpness of the break with Roth, represented by the third element of the Memoirs test and emphasized by Mr. Justice White's dissent, id., at 460—462, 86 S.Ct., at 999, was further underscored when the Memoirs plurality went on to state:

'The Supreme Judicial Court erred in holding that a book need not be 'unqualifiedly worthless before it can be deemed obscene.' A book cannot be proscribed unless it is found to be utterly without redeeming social value.' Id., at 419, 86 S.Ct., at 978 (emphasis in original).

While Roth presumed 'obscenity' to be 'utterly without redeeming social importance,' Memoirs required ***22** that to prove obscenity it must be affirmatively established that the material is 'utterly without redeeming social value.' Thus, even as they repeated the words of Roth, the Memoirs plurality produced a drastically altered test that called on the prosecution to prove a negative, i.e., that the material was 'utterly without redeeming social value'—a burden virtually impossible to discharge under our criminal standards of proof. Such considerations caused Mr. Justice Harlan to wonder if the 'utterly without redeeming social value' test had any meaning at all. See Memoirs v. Massachusetts, id., at 459, 86 S.Ct., at 998 (Harlan, J., dissenting). ****2614** See also id., at 461, 86 S.Ct., at 999 (White, J., dissenting); United States v. Groner, 479 F.2d 577, 579—581 (CA,5 1973).

[1] Apart from the initial formulation in the Roth case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power. See, e.g., Redrup v. New York, 386 U.S., at 770—771, 87 S.Ct., at 1415—1416. We have seen 'a variety of views among the members of the Court unmatched in any other course of constitutional adjudication.' Interstate Circuit, Inc. v. Dallas, 390 U.S., at 704—705, 88 S.Ct., at 1314 (Harlan, J., concurring and dissenting) (footnote omitted).[3] This is not remarkable, for in the area ***23** of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression. This is an area in which there are few eternal verities.

3 In the absence of a majority view, this Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment. Redrup v. New York, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967). Thirty-one cases have been decided in this manner. Beyond the necessity of circumstances, however, no justification has ever been offered in support of the Redrup 'policy.' See Walker v. Ohio, 398 U.S. 434—435, 90 S.Ct. 1884, 26 L.Ed.2d 385 (1970) (dissenting opinions of Burger, C.J., and Harlan, J. The Redrup procedure has cast us in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us.

The case we now review was tried on the theory that the California Penal Code s 311 approximately incorporates the three-stage Memoirs test, supra. But now the Memoirs test has been abandoned as unworkable by its author,[4] and no Member of the Court today supports the Memoirs formulation.

4 See the dissenting opinion of Mr. Justice Brennan in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73, 93 S.Ct. 2628, 2642, 37 L.Ed.2d 446 (1973).

II

[2] [3] [4] [5] This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment. Kois v. Wisconsin, 408 U.S. 229, 92 S.Ct. 2245, 33 L.Ed.2d 312 (1972); United States v. Reidel, 402 U.S., at 354, 91 S.Ct., at 1411—1412; Roth v. United States, supra, 354 U.S., at 485, 77 S.Ct., at 1309.[5] 'The First and Fourteenth Amendments have never been treated as absolutes (footnote omitted).'

Breard v. Alexandria, 341 U.S., at 642, 71 S.Ct., at 932, and cases cited. See Times Film Corp. v. Chicago, 365 U.S. 43, 47—50, 81 S.Ct. 391, 393—395, 5 L.Ed.2d 403 (1961); Joseph Burstyn, Inc. v. Wilson, 343 U.S., at 502, 72 S.Ct., at 780. We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be ***24** carefully limited. See Interstate Circuit, Inc. v. Dallas, supra, 390 U.S., at 682—685, 88 S.Ct., at 1302—1305. As a result, we now confine the permissible scope of such regulation to works which depict or describe ****2615** sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed.[6] A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

5 As Mr. Chief Justice Warren stated, dissenting in Jacobellis v. Ohio, 378 U.S. 184, 200, 84 S.Ct. 1676, 1684, 12 L.Ed.2d 793 (1964):
'For all the sound and fury that the Roth test has generated, it has not been proved unsound, and I believe that we should try to live with it—at least until a more satisfactory definition is evolved. No government—be it federal, state, or local—should be forced to choose between repressing all material, including that within the realm of decency, and allowing unrestrained license to publish any material, no matter how vile. There must be a rule of reason in this as in other areas of the law, and we hae attempted in the Roth case to provide such a rule.'

6 See, e.g., Oregon Laws 1971, c. 743, Art. 29, ss 255—262, and Hawaii Penal Code, Tit. 37, ss 1210—1216, 1972 Hawaii Session Laws, Act 9, c. 12, pt. II, pp. 126—129, as examples of state laws directed at depiction of defined physical conduct, as opposed to expression. Other state formulations could be equally valid in this respect. In giving the Oregon and Hawaii statutes as examples, we do not wish to be understood as approving of them in all other respects nor as establishing their limits as the extent of state power.
We do not hold, as Mr. Justice BRENNAN intimates, that all States other than Oregon must now enact new obscenity statutes. Other existing state statutes, as construed heretofore or hereafter, may well be adequate. See United States v. 12 200-ft. Reels of Super 8 mm. Film, 413 U.S. 123, at 130 n. 7, 93 S.Ct. 2665, at 2670 n. 7, 37 L.Ed.2d 500.

[6] [7] [8] The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, Kois v. Wisconsin, supra, 408 U.S., at 230, 92 S.Ct., at 2246, quoting Roth v. United States, supra, 354 U.S., at 489, 77 S.Ct., at 1311; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constituional standard the 'utterly without redeeming social value' test of ***25** Memoirs v. Massachusetts, 383 U.S., at 419, 86 S.Ct., at 977; that concept has never commanded the adherence of more than three Justices at one time.[7] See supra, at 2613. If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellante courts to conduct an independent review of constitutional claims when necessary. See Kois v. Wisconsin, supra, 408 U.S., at 232, 92 S.Ct., at 2247; Memoirs v. Massachuetts, supra, 383 U.S., at 459—460, 86 S.Ct., at 998 (Harlan, J., dissenting); Jacobellis v. Ohio, 378 U.S., at 204, 84 S.Ct., at 1686 (Harlan, J., dissenting); New York Times Co. v. Sullivan, 376 U.S. 254, 284—285, 84 S.Ct. 710, 728, 11 L.Ed.2d 686 (1964); Roth v. United States, supra, 354 U.S., at 497—498, 77 S.Ct., at 1315—1316 (Harlan, J., concurring and dissenting).

7 'A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication . . .' Kois v. Wisconsin, 408 U.S., 229, 231, 92 S.Ct. 2245, 2246, 33 L.Ed.2d 312 (1972). See Memoirs v. Massachusetts, 383 U.S. 413, 461, 86 S.Ct. 975, 999, 16 L.Ed.2d 1 (1966) (White, J., dissenting). We also reject, as a constitutional standard, the ambiguous concept of 'social importance.' See id., at 462, 86 S.Ct., at 999 (White, J., dissenting).

[9] [10] We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, supra:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

[11] **[12]** **[13]** Sex and nudity may not be exploited without limit by films or pictures ****2616** exhibited or sold in places of public accommodation any more than live sex and nudity can ***26** be exhibited or sold without limit in such public places. [8] At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection. See Kois v. Wisconsin, supra, 408 U.S., at 230—232, 92 S.Ct., at 2246—2247; Roth v. United States, supra, 354 U.S., at 487, 77 S.Ct., at 1310; Thornhill v. Alabama, 310 U.S. 88, 101—102, 60 S.Ct. 736, 743—744, 84 L.Ed. 1093 (1940). For example, medical books for the education of physicians and related personnel necessarily use graphic illustrations and descriptions of human anatomy. In resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide, as we do with rape, murder, and a host of other offenses against society and its individual members. [9]

8 Although we are not presented here with the problem of regulating lewd public conduct itself, the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior. In United States v. O'Brien, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968), a case not dealing with obscenity, the Court held a State regulation of conduct which itself embodied both speech and nonspeech elements to be 'sufficiently justified if . . . it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.' See California v. LaRue, 409 U.S. 109, 117—118, 93 S.Ct. 390, 396—397, 34 L.Ed.2d 342 (1972).

9 The mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged. As this Court observed in Roth v. United States, 354 U.S., at 492 n. 30, 77 S.Ct., at 1313 n. 30, 'it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system. Cf. Dunlop v. United States 486, 499-500.'

Mr. Justice BRENNAN, author of the opinions of the Court, or the plurality opinions, in Roth v. United States, supra; Jacobellis v. Ohio, supra; ***27** Ginzburg v. United States, 383 U.S. 463, 86 S.Ct. 952, 16 L.Ed.2d 31 (1966); Mishkin v. New York, 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56 (1966); and Memoiors v. Massachusetts, supra, has abandoned his former position and now maintains that no formulation of this Court, the Congress, or the States can adequately distinguish obscene material unprotected by the First Amendment from protected expression, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73, 93 S.Ct. 2628, 2642, 37 L.Ed.2d 446 (Brennan, J., dissenting). Paradoxically, Mr. Justice BRENNAN indicates that suppression of unprotected obscene material is permissible to avoid exposure to unconsenting adults, as in this case, and to juveniles, although he gives no indication of how the division between protected and nonprotected materials may be drawn with greater precision for these purposes than for regulation of commercial exposure to consenting adults only. Nor does he indicate where in the Constitution he fines the authority to distinguish between a willing 'adult' one month past the state law age of majority and a weilling 'juvenile' one month younger.

[14] Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities ****2617** may bring prosecution. See Roth v. United States, supra, 354 U.S., at 491—492, 77 S.Ct., at 1312—1313. Cf. Ginsberg v. New York, 390 U.S., at 643, 88 S.Ct., at 1282. [10] If ***28** the inability to define regulated materials with ultimate, god-like precision altogether removes the power of the States or the Congress to regulate, then 'hard core' pornography may be exposed without limit to the juvenile, the passerby, and the consenting adult alike, as, indeed, Mr. Justice Douglas contends. As to Mr. Justice Douglas' position, see United States v. Thirty-seven Photographs, 402 U.S.

363, 379—380, 91 S.Ct. 1400, 1409—1410, 28 L.Ed.2d 822 (1971) (Black, J., joined by Douglas, J., dissenting); Ginzburg v. United States, supra, 383 U.S. at 476, 491—492, 86 S.Ct., at 950, 974 (Black, J., and Douglas, J., dissenting); Jacobellis v. Ohio, supra, 378 U.S., at 196, 84 S.Ct., at 1682 (Black, J., joined by Douglas, J., concurring); Roth, supra, 354 U.S., at 508—514, 77 S.Ct., at 1321—1324 (Douglas, J., dissenting). In this belief, however, Mr. Justice DOUGLAS now stands alone.

10 As Mr. Justice Brennan stated for the Court in Roth v. United States, supra, 354 U.S., at 491—492, 77 S.Ct., at 1312—1313:
'Many decisions have recognized that these terms of obscenity statutes are not precise. (Footnote omitted.) This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. '. . . (T)he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .' United States v. Petrillo, 332 U.S. 1, 7—8, 67 S.Ct. 1538, 1542, 91 L.Ed. 1877. These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark '. . . boundaries sufficiently distinct for judges and juries to fairly administer the law . . .. That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . .' Id., 332 U.S. at page 7, 67 S.Ct., at page 1542. See also United States v. Harriss, 347 U.S. 612, 624, n. 15, 14 S.Ct. 808, 815, 98 L.Ed. 989; Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340, 72 S.Ct. 329, 330, 96 L.Ed. 367; United States v. Ragen, 314 U.S. 513, 523—524, 62 S.Ct. 374, 378, 86 L.Ed. 383; United States v. Wurzbach, 280 U.S. 396, 50 S.Ct. 167, 74 L.Ed. 508; Hygrade Provision Co. v. Sherman, 266 U.S. 497, 45 S.Ct. 141, 69 L.Ed. 402; Fox. v. Washington, 236 U.S. 273, 35 S.Ct. 383, 59 L.Ed. 573; Nash v. United States, 229 U.S. 373, 33 S.Ct. 780, 57 L.Ed. 1232.

Mr. Justice Brennan also emphasizes 'institutional stress' in justification of his change of view. Nothing that '(t)he number of obscenity cases on our docket gives ample testimony to the burden that has been placed upon this Court,' he quite rightly remarks that the examination of contested materials 'is hardly a source of edification to the members of this Court.' ***29** Paris Adult Theatre I v. Slaton, supra, 413 U.S., at 92, 93, 93 S.Ct., at 2652. He also notes, and we agree, that 'uncertainty of the standards creates a continuing source of tension between state and federal courts . . ..' 'The problem is . . . that one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so.' Id., at 93, 92, 93 S.Ct., at 2652.

It is certainly true that the absence, since Roth, of a single majority view of this Court as to proper standards for testing obscenity has placed a strain on both state and federal courts. But today, for the first time since Roth was decided in 1957, a majority of this Court has agreed on concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment. Now we may abandon the casual practice of Redrup v. New York, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967), and attempt to provide positive ****2618** guidance to federal and state courts alike.

This may not be an easy road, free from difficulty. But no amount of 'fatigue' should lead us to adopt a convenient 'institutional' rationale—an absolutist, 'anything goes' view of the First Amendment—because it will lighten our burdens.[11] 'Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees.' Jacobellis v. Ohio, supra, 378 U.S., at 187—188, 84 S.Ct., at 1678 (opinion of Brennan, J.). Nor should we remedy 'tension between state and federal courts' by arbitrarily depriving the States of a power reserved to them under the Constitution, a power which they have enjoyed and exercised continuously from before the adoption of the First Amendment to this day. See Roth v. United States, supra, 354 U.S., at 482—485, 77 S.Ct., at 1307—1309. 'Our duty admits of no 'substitute for facing up ***30** to the tough individual problems of constitutional judgment involved in every obscenity case.' (Roth v. United States, supra, at 498, 77 S.Ct., at 1316); see Manual Enterprises, Inc. v. Day, 370 U.S. 478, 488, 82 S.Ct., 1432, 1437, 8 L.Ed.2d 639 (opinion of Harlan, J.) (footnote omitted).' Jacobellis v. Ohio, supra, 378 U.S., at 188, 84 S.Ct., at 1678 (opinion of Brennan, J.).

11 We must note, in addition, that any assumption concerning the relative burdens of the past and the probable burden under the standards now adopted is pure speculation.

III

[15] Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive.' These are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. When triers of fact are asked to decide whether 'the average person, applying contemporary community standards' would consider certain materials 'prurient,' it would be unrealistic to require that the answer be based on some abstract formulation. The adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law. To require a State to structure obscenity proceedings around evidence of a national 'community standard' would be an exercise in futility.

As noted before, this case was tried on the theory that the California obscenity statute sought to incorporate the tripartite test of Memoirs. This, a 'national' standard of First Amendment protection enumerated by a plurality of this Court, was correctly regarded at the time of trial as limiting state prosecution under the controlling case ***31** law. The jury, however, was explicitly instructed that, in determining whether the 'dominant theme of the material as a whole . . . appeals to the prurient interest' and in determining whether the material 'goes substantially beyond customary limits of candor and affronts contemporary community standards of decency,' it was to apply 'contemporary community standards of the State of California.'

[16] During the trial, both the prosecution and the defense assumed that the relevant 'community standards' in making the factual determination of obscenity were those of the State of California, not some hypothetical standard of the entire United States of America. Defense counsel at trial never objected to the testimony of the State's expert on ****2619** community standards [12] or to the instructions of the trial judge on 'statewide' standards. On appeal to the Appellate Department, Superior Court of California, County of Orange, appellant for the first time contended that application of state, rather than national, standards violated the First and Fourteenth Amendments.

12 The record simply does not support appellant's contention, belatedly raised on appeal, that the State's expert was unqualified to give evidence on California 'community standards.' The expert, a police officer with many years of specialization in obscenity offenses, had conducted an extensive statewide survey and had given expert evidence on 26 occasions in the year prior to this trial. Allowing such expert testimony was certainly not constitutional error. Cf. United States v. Augenblick, 393 U.S. 348, 356, 89 S.Ct. 528, 533, 21 L.Ed.2d 537 (1969).

[17] We conclude that neither the State's alleged failure to offer evidence of 'national standards,' nor the trial court's charge that the jury consider state community standards, were constitutional errors. Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable 'national standards' when attempting to determine whether certain materials are obscene as a matter ***32** of fact. Mr. Chief Justice Warren pointedly commented in his dissent in Jacobellis v. Ohio, supra, at 200, 84 S.Ct., at 1685:

> 'It is my belief that when the Court said in Roth that obscenity is to be defined by reference to 'community standards,' it meant community standards—not a national standard, as is sometimes argued. I believe that there is no provable 'national standard' . . .. At all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one.'

[18] **[19]** **[20]** **[21]** **[22]** It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City. [13] ***33** See Hoyt v. Minnesota, 399 U.S. 524—525, 90 S.Ct. 2241 (1970) (Blackmun, J., dissenting); ****2620** Walker v. Ohio, 398 U.S. 434, 90 S.Ct. 1884, 26 L.Ed.2d 385 (1970) (Burger, C.J., dissenting); id., at 434—435, 90 S.Ct., at 1884 (Harlan, J.,

dissenting); Cain v. Kentucky, 397 U.S. 319, 90 S.Ct. 1110, 25 L.Ed.2d 334 (1970) (Burger, C.J., dissenting); id., at 319—320, 90 S.Ct., at 1110 (Harlan, J., dissenting); United States v. Groner, 479 F.2d 577, at 581—583. O'Meara & Shaffer, Obscenity in The Supreme Court: A Note on Jacobellis v. Ohio, 40 Notre Dame Law. 1, 6—7 (1964). See also Memoirs v. Massachusetts, 383 U.S., at 458, 86 S.Ct., at 997 (Harlan, J., dissenting); Jacobellis v. Ohio, supra, 378 U.S., at 203—204, 84 S.Ct., at 1686 (Harlan, J., dissenting); Roth v. United States, supra, 354 U.S., at 505—506, 77 S.Ct., at 1319—1320 (Harlan, J., concurring and dissenting). People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity. As the Court made clear in Mishkin v. New York, 383 U.S., at 508—509, 86 S.Ct., at 963, the primary concern with requiring a jury to apply the standard of 'the average person, applying contemporary community standards' is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one. See Roth v. United States, supra, 354 U.S., at 489, 77 S.Ct., at 1311. Cf. the now discredited test in Regina v. Hicklin, (1868) L.R. 3 Q.B. 360. We hold that the requirement that the jury evaluate the materials with reference to 'contemporary ***34** standards of the State of California' serves this protective purpose and is constitutionally adequate. [14]

13 In Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964), two Justices argued that application of 'local' community standards would run the risk of preventing dissemination of materials in some places because sellers would be unwilling to risk criminal conviction by testing variations in standards from place to place. Id., at 194—195, 84 S.Ct., at 1681—1682 (opinion of Brennan, J., joined by Goldberg, J.). The use of 'national' standards, however, necessarily implies that materials found tolerable in some places, but not under the 'national' criteria, will nevertheless be unavailable where they are acceptable. Thus, in terms of danger to free expression, the potential for suppression seems at least as great in the application of a single nation-wide standard as in allowing distribution in accordance with local tastes, a point which Mr. Justice Harlan often emphasized. See Roth v. United States, 354 U.S., at 506, 77 S.Ct., at 1320.

Appellant also argues that adherence to a 'national standard' is necessary 'in order to avoid unconscionable burdens on the free flow of interstate commerce.' As noted supra, at 2611 n. 1, the application of domestic state police powers in this case did not intrude on any congressional powers under Art. I, s 8, cl. 3, for there is no indication that appellant's materials were ever distributed interstate. Appellant's argument would appear without substance in any event. Obscene material may be validly regulated by a State in the exercise of its traditional local power to protect the general welfare of its population despite some possible incidental effect on the flow of such materials across state lines. See, e.g., Head v. New Mexcio Board, 374 U.S. 424, 83 S.Ct. 1759, 10 L.Ed.2d 983 (1963); Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960); Breard v. Alexandria, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233 (1951); H. P. Hood & Sons v. Du Mond, 336 U.S. 525, 69 S.Ct. 657, 93 L.Ed. 865 (1949); Southern Pacific Co. v. Arizona, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032 (1935); Sligh v. Kirkwood, 237 U.S. 52, 35 S.Ct. 501, 59 L.Ed. 835 (1915).

14 Appellant's jurisdictional statement contends that he was subjected to 'double jeopardy' because a Los Angeles County trial judge dismissed, before trial, a prior prosecution based on the same brochures, but apparently alleging exposures at a different time in a different setting. Appellant argues that once material has been found not to be obscene in one proceeding, the State is 'collaterally estopped' from ever alleging it to be obscene in a different proceeding. It is not clear from the record that appellant properly raised this issue, better regarded as a question of procedural due process than a 'double jeopardy' claim, in the state courts below. Appellant failed to address any portion of his brief on the merits to this issue, and appellee contends that the question was waived under California law because it was improperly pleaded at trial. Nor is it totally clear from the record before us what collateral effect the pretrial dismissal might have under state law. The dismissal was based, a least in part, on a failure of the prosecution to present affirmative evidence required by state law, evidence which was apparently presented in this case. Appellant's contention, therefore, is best left to the California courts for further consideration on remand. The issue is not, in any event, a proper subject for appeal. See Mishkin v. New York, 383 U.S. 502, 512—514, 86 S.Ct. 958, 965—966, 16 L.Ed.2d 56 (1966).

IV

The dissenting Justices sound the alarm of repression. But, in our view, to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. It is a 'misuse of the great guarantees of free speech and free press . . ..' Breard v. Alexandria, 341 U.S., at 645, 71 S.Ct., at 934. The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent. 'The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of ***35** political and social changes desired by the people,' ****2621** Roth v. United States, supra, 354 U.S., at 484, 77 S.Ct., at 1308 (emphasis added). See Kois v. Wisconsin, 408 U.S., at 230—232, 92 S.Ct., at 2246—2247; Thornhill v. Alabama, 310 U.S., at 101—102, 60 S.Ct., at 743—744. But the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter. [15]

15 In the apt words of Mr. Chief Justice Warren, the appellant in this case was 'plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect. I believe that the State and Federal Governments can constitutionally punish such conduct. That is all that these cases present to us, and that is all we need to decide.' Roth v. United States, supra, 354 U.S., at 496, 77 S.Ct., at 1315 (concurring opinion).

There is no evidence, empirical or historical, that the stern 19th century American censorship of public distribution and display of material relating to sex, see Roth v. United States, supra, 354 U.S., at 482—485, 77 S.Ct., at 1307—1309, in any way limited or affected expression of serious literary, artistic, political, or scientific ideas. On the contrary, it is beyond any question that the era following Thomas Jefferson to Theodore Roosevelt was an 'extraordinarily vigorous period,' not just in economics and politics, but in belles lettres and in 'the outlying fields of social and political philosophies.' [16] We do not see the harsh hand ***36** of censorship of ideas—good or bad, sound or unsound—and 'repression' of political liberty lurking in every state regulation of commercial exploitation of human interest in sex.

16 See 2 V. Parrington, Main Currents in American Thought ix et seq. (1930). As to the latter part of the 19th century, Parrington observed 'A new age had come and other dreams—the age and the dreams of middle-class sovereignty . . .. From the crude and vast romanticisms of that vigorous sovereignty emerged eventually a spirit of realistic criticism, seeking to evaluate the worth of this new America, and discover if possible other philosophies to take the place of those which had gone down in the fierce battles of the Civil War.' Id., at 474. Cf. 2 Morison, H. Commager & W. Leuchtenburg, The Growth of the American Republic 197—233 (6th ed. 1969); Paths of American Thought 123—166, 203—290 (A. Schlesinger & M. White ed. 1963) (articles of Fleming, Lerner, Morton & Lucia White, E. Rostow, Samuelson, Kazin, Hofstadter); and H. Wish, Society and Thought in Modern America 337—386 (1952).

Mr. Justice Brennan finds 'it is hard to see how state-ordered regimentation of our minds can ever be forestalled.' Paris Adult Theatre I v. Slaton, 413 U.S., at 110, 93 S.Ct., at 2661 (Brennan, J., dissenting). These doleful anticipations assume that courts cannot distinguish commerce in ideas, protected by the First Amendment, from commercial exploitation of obscene material. Moreover, state regulation of hard-core pornography so as to make it unavailable to nonadults, a regulation which Mr. Justice Brennan finds constitutionally permissible, has all the elements of 'censorship' for adults; indeed even more rigid enforcement techniques may be called for with such dichotomy of regulation. See Interstate Circuit, Inc. v. Dallas, 390 U.S., at 690, 88 S.Ct., at 1306. [17] One can concede that the 'sexual revolution' of recent years may have had useful byproducts in striking layers of prudery from a subject long irrationally kept from needed ventilation. But it does not follow that no regulation of patently offensive 'hard core' materials is needed or permissible; civilized people do not allow unregulated access to heroin because it is a derivative of medicinal morphine.

17 '(W)e have indicated . . . that because of its strong and abiding interest in youth, a State may regulate the dissemination to juveniles of, and their access to, material objectionable as to them, but which a State clearly could not regulate as to adults. Ginsberg v. New York, . . . (390 U.S. 629, 88 S.Ct. 1274,

20 L.Ed.2d 195 (1968)).' Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 690, 88 S.Ct. 1298, at 1306, 20 L.Ed.2d 225 (1968) (footnote omitted).

****2622** In sum, we (a) reaffirm the Roth holding that obscene material is not protected by the First Amendment; (b) hold that such material can be regulated by the States, subject to the specific safeguards enunciated ***37** above, without a showing that the material is 'utterly without redeeming social value'; and (c) hold that obscenity is to be determined by applying 'contemporary community standards,' see Kois v. Wisconsin, supra, 408 U.S., at 230, 92 S.Ct., at 2246, and Roth v. United States, supra, 354 U.S., at 489, 77 S.Ct., at 1311, not 'national standards.' The judgment of the Appellate Department of the Superior Court, Orange County, California, is vacated and the case remanded to that court for further proceedings not inconsistent with the First Amendment standards established by this opinion. See United States v. 12 200-Foot Reels of Super 8mm. Film, 413 U.S. 123, at 130 n. 7, 93 S.Ct. 2665, at 2670 n. 7, 37 L.Ed.2d 500.

Vacated and remanded.

Mr. Justice DOUGLAS, dissenting.

I

Today we levae open the way for California [1] to send a man to prison for distributing brochures that advertise books and a movie under freshly written standards defining obscenity which until today's decision were never the part of any law.

1 California defines 'obscene matter' as 'matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance.' Calif.Penal Code s 311(a).

The Court has worked hard to define obscenity and concededly has failed. In Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498, it ruled that '(o)bscene material is material which deals with sex in a manner appealing to prurient interest.' Id., at 487, 77 S.Ct., at 1310. Obscenity, it was said, was rejected by the First Amendment because it is 'utterly without redeeming ***38** social importance.' Id., at 484, 77 S.Ct., at 1308. The presence of a 'prurient interest' was to be determined by 'contemporary community standards.' Id., at 489, 77 S.Ct., at 1311. That test, it has been said, could not be determined by one standard here and another standard there, Jacobellis v. Ohio, 378 U.S. 184, 194, 84 S.Ct. 1676, 1682, 12 L.Ed.2d 793, but 'on the basis of a national standard.' Id., at 195, 84 S.Ct., at 1682. My brother Stewart in Jacobellis commented that the difficulty of the Court in giving content to obscenity was that it was 'faced with the task of trying to define what may be indefinable.' Id., at 197, 84 S.Ct., at 1683.

In Memoirs v. Massachusetts, 383 U.S. 413, 418, 86 S.Ct. 975, 977, 16 L.Ed.2d 1, the Roth test was elaborated to read as follows: '(T)hree elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.'

In Ginzburg v. United States, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31, a publisher was sent to prison, not for the kind of books and periodicals he sold, but for the manner in which the publications were advertised. The 'leer of the sensualist' was said to permeate the advertisements. Id., at 468, 86 S.Ct., at 946. The Court said, 'Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact ****2623** may be decisive in the determination of obscenity.' Id., at 470, 86 S.Ct., at 947. As Mr. Justice Black said in dissent, '. . . Ginzburg . . . is now finally and authoritatively condemned to serve five years in prison for distributing printed matter about sex which neither Ginzburg nor anyone else could possibly have known to be criminal.' Id., at 476, 86 S.Ct., at 950. That observation by Mr. Justice Black is underlined by the fact that the Ginzburg decision was five to four.

***39** A further refinement was added by Ginsberg v. New York, 390 U.S. 629, 641, 88 S.Ct. 1274, 1281, 20 L.Ed.2d 195, where the Court held that 'it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors.'

But even those members of this Court who had created the new and changing standards of 'obscenity' could not agree on their application. And so we adopted a per curiam treatment of so-called obscene publications that seemed to pass constitutional muster under the several constitutional tests which had been formulated. See Redrup v. New York, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515. Some condemn it if its 'dominant tendency might be to 'deprave or corrupt' a reader.'[2] Others look not to the content of the book but to whether it is advertised "to appeal to the erotic interests of customers."[3] Some condemn only 'hardcore pornography'; but even then a true definition is lacking. It has indeed been said of that definition, 'I could never succeed in (defining it) intelligibly,' but 'I know it when I see it.'[4]

2 Roth v. United States, 354 U.S. 476, 502, 77 S.Ct. 1304, 1318, 1 L.Ed.2d 1498 (opinion of Harlan, J.).

3 Ginzburg v. United States, 383 U.S. 463, 467, 86 S.Ct. 942, 945, 16 L.Ed.2d 31.

4 Jacobellis v. Ohio, 378 U.S. 184, 197, 84 S.Ct. 1676, 1683, 12 L.Ed.2d 793 (Stewart, J., concurring).

Today we would add a new three-pronged test: '(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.'

Those are the standards we ourselves have written into the Constitution.[5] Yet how under these vague tests can ***40** we sustain convictions for the sale of an article prior to the time when some court has declared it to be obscene?

5 At the conclusion of a two-year study, the U.S. Commission on Obscenity and Pornography determined that the standards we have written interfere with constitutionally protected materials: 'Society's attempts to legislate for adults in the area of obscenity have not been successful. Present laws prohibiting the consensual sale or distribution of explicit sexual materials to adults are extremely unsatisfactory in their practical application. The Constitution permits material to be deemed 'obscene' for adults only if, as a whole, it appeals to the 'prurient' interest of the average person, is 'patently offensive' in light of 'community standards,' and lacks 'redeeming social value.' These vague and highly subjective aesthetic, psychological and moral tests do not provide meaningful guidance for law enforcement officials, juries or courts. As a result, law is inconsistently and sometimes erroneously applied and the distinction made by courts between prohibited and permissible materials often appear indefensible. Errors in the application of the law and uncertainty about its scope also cause interference with the communication of constitutionally protected materials.' Report of the Commission on Obscenity and Pornography 53 (1970).

Today the Court retreats from the earlier formulations of the constitutional test and undertakes to make new definitions. This effort, like the earlier ones, is earnest and well intentioned. The difficulty is that we do not deal with constitutional terms, since 'obscenity' is not mentioned in the Constitution or Bill ****2624** of Rights. And the First Amendment makes no such exception from 'the press' which it undertakes to protect nor, as I have said on other occasions, is an exception necessarily implied, for there was no recognized exception to the free press at the time the Bill of Rights was adopted which treated 'obscene' publications differently from other types of papers, magazines, and books. So there are no constitutional guidelines for deciding what is and what is not 'obscene.' The Court is at large because we deal with tastes and standards of literature. What shocks me may ***41** be sustenance for my neighbor. What causes one person to boil up in rage over one pamphlet or movie may reflect only his neurosis, not shared by others. We deal here with a regime of censorship which, if adopted, should be done by constitutional amendment after full debate by the people.

Obscenity cases usually generate tremendous emotional outbursts. They have no business being in the courts. If a constitutional amendment authorized censorship, the censor would probably be an administrative agency. Then criminal prosecutions could follow as, if, and when publishers defied the censor and sold their literature. Under that regime a publisher would know when he was on dangerous ground. Under the present regime—whether the old standards or the new ones are used—the criminal law becomes a trap. A brand new test would put a publisher behind bars under a new law improvised by the courts after the publication. That was done in Ginzburg and has all the evils of an ex post facto law.

My contention is that until a civil proceeding has placed a tract beyond the pale, no criminal prosecution should be sustained. For no more vivid illustration of vague and uncertain laws could be designed than those we have fashioned. As Mr. Justice Harlan has said:
'The upshot of all this divergence in viewpoint is that anyone who undertakes to examine the Court's decisions since Roth which have held particular material obscene or not obscene would find himself in utter bewilderment.' Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 707, 88 S.Ct. 1298, 1315, 20 L.Ed.2d 225.

In Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894, we upset a conviction for remaining on property after being asked to leave, while the only unlawful act charged by the statute was entering. We held that the defendants had received no 'fair warning, at the time of their conduct' ***42** while on the property 'that the act for which they now stand convicted was rendered criminal' by the state statute. Id., at 355, 84 S.Ct., at 1703. The same requirement of 'fair warning' is due here, as much as in Bouie. The latter involved racial discrimination; the present case involves rights earnestly urged as being protected by the First Amendment. In any case—certainly when constitutional rights are concerned—we should not allow men to go to prison or be fined when they had no 'fair warning' that what they did was criminal conduct.

II

If a specific book, play, paper, or motion picture has in a civil proceeding been condemned as obscene and review of that finding has been completed, and thereafter a person publishers, shows, or displays that particular book or film, then a vague law has been made specific. There would remain the underlying question whether the First Amendment allows an implied exception in the case of obscenity. I do not think it does[6] ****2625** and my views ***43** on the issue have been stated over and over again.[7] But at least a criminal prosecution brought at that juncture would not violate the time-honored void-for-vagueness test.[8]

6 It is said that 'obscene' publications can be banned on authority of restraints on communications incident to decrees restraining unlawful business monopolies or unlawful restraints of trade, Sugar Institute v. United States, 297 U.S. 553, 597, 56 S.Ct. 629, 641, 89 L.Ed. 859, or communications respecting the sale of spurious or fraudulent securities. Hall v. Geiger-Jones Co., 242 U.S. 539, 549, 37 S.Ct. 217, 220, 61 L.Ed. 480; Caldwell v. Sioux Falls Stock Yards Co., 242 U.S. 559, 567, 37 S.Ct. 224, 226, 61 L.Ed. 493; Merrick v. Halsey & Co., 242 U.S. 568, 584, 37 S.Ct. 227, 230, 61 L.Ed. 498. The First Amendment answer is that whenever speech and conduct are brigaded—as they are when one shouts 'Fire' in a crowded theater—speech can be outlawed. Mr. Justice Black, writing for a unanimous Court in Giboney v. Empire Storage Co., 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834, stated that labor unions court be restrained from picketing a firm in support of a secondary boycott which a State had validly outlawed. Mr. Justice Black said: 'It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now.' Id., at 498, 69 S.Ct., at 688.

7 See United States v. 12 200-Foot Reels of Super 8mm. Film, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500; United States v. Orito, 413 U.S. 139, 93 S.Ct. 2674, 37 L.Ed.2d 513; Kois v. Wisconsin, 408 U.S. 229, 92 S.Ct. 2245, 33 L.Ed.2d 312; Byrne v. Karalexis, 396 U.S. 976, 977, 90 S.Ct. 469, 470, 24 L.Ed.2d 447; Ginsberg v. New York, 390 U.S. 629, 650, 88 S.Ct. 1274, 1286, 20 L.Ed.2d 195; Jacobs v. New York, 388 U.S. 431, 436, 87 S.Ct. 2098, 2101, 18 L.Ed.2d 1294; Ginzburg v. United States, 383 U.S. 463, 482, 86 S.Ct. 942, 953, 16 L.Ed.2d 31; Memoirs v. Massachusetts, 383 U.S. 413, 424, 86 S.Ct. 975, 980, 16 L.Ed.2d 1; Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 72, 83 S.Ct. 631, 640, 9 L.Ed.2d 584; Times Film Corp. v. City of Chicago, 365 U.S. 43, 78, 81 S.Ct. 391, 410, 5 L.Ed.2d 403; Smith v. California, 361 U.S. 147, 167, 80 S.Ct. 215, 226, 4 L.Ed.2d 205; Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 697, 79 S.Ct. 1362, 1369, 3 L.Ed.2d 1512; Roth v. United States, 354 U.S. 476, 508, 77 S.Ct. 1304, 1321, 1 L.Ed.2d 1498; Kingsley Books, Inc. v. Brown, 354 U.S. 436, 446, 77 S.Ct. 1325, 1330, 1 L.Ed.2d 1469; Superior Films, Inc. v. Department of Education, 346 U.S. 587, 588, 74 S.Ct. 286, 98 L.Ed. 329; Gelling v. Texas, 343 U.S. 960, 72 S.Ct. 1002, 96 L.Ed. 1359.

8 The Commission on Obscenity and Pornography has advocated such a procedure:
'The Commission recommends the enactment, in all jurisdictions which enact or retain provisions prohibiting the dissemination of sexual materials to adults or young persons, of legislation authorizing

prosecutors to obtain declaratory judgments as to whether particular materials fall within existing legal prohibitions . . ..

'A declaratory judgment procedure . . . would permit prosecutors to proceed civilly, rather than through the criminal process, against suspected violations of obscenity prohibition. If such civil procedures are utilized, penalties would be imposed for violation of the law only with respect to conduct occurring after a civil declaration is obtained. The Commission believes this course of action to be appropriate whenever there is any existing doubt regarding the legal status of materials; where other alternatives are available, the criminal process should not ordinarily be invoked against persons who might have reasonably believed, in good faith, that the books or films they distributed were entitled to constitutional protection, for the threat of criminal sanctions might otherwise deter the free distribution of constitutionally protected material.' Report of the Commission on Obscenity and Pornography 63 (1970).

No such protective procedure has been designed by California in this case. Obscenity—which even we cannot define with precision—is a hodge-podge. To send ***44** men to jail for violating standards they cannot understand, construe, and apply is a monstrous thing to do in a Nation dedicated to fair trials and due process.

III

While the right to know is the corollary of the right to speak or publish, no one can be forced by government to listen to disclosure that he finds offensive. That was the basis of my dissent in Public Utilities Comm'n v. Pollak, 343 U.S. 451, 467, 72 S.Ct. 813, 823, 96 L.Ed. 1068, where I protested against making streetcar passengers a 'captive' audience. There is no 'captive audience' problem in these obscenity cases. No one is being compelled to look or to listen. Those who enter newsstands ****2626** or bookstalls may be offended by what they see. But they are not compelled by the State to frequent those places; and it is only state or governmental action against which the First Amendment, applicable to the States by virtue of the Fourteenth, raises a ban.

The idea that the First Amendment permits government to ban publications that are 'offensive' to some people puts an ominous gloss on freedom of the press. That test would make it possible to ban any paper or any journal or magazine in some benighted place. The First Amendment was designed 'to invite dispute,' to induce 'a condition of unrest,' to 'create dissatisfaction with conditions as they are,' and even to stir 'people' to anger.' Terminiello v. Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 896, 93 L.Ed. 1131. The idea that the First Amendment permits punishment for ideas that are 'offensive' to the particular judge or jury sitting in judgment is astounding. No greater leveler of speech or literature has ever been designed. To give the power to the censor, as we do today, is to make a sharp and radical break with the traditions of a free society. The First Amendment was not fashioned as a vehicle for ***45** dispensing tranquilizers to the people. Its prime function was to keep debate open to 'offensive' as well as to 'staid' people. The tendency throughout history has been to subdue the individual and to exalt the power of government. The use of the standard 'offensive' gives authority to government that cuts the very vitals out of the First Amendment.[9] As is intimated by the Court's opinion, the materials before us may be garbage. But so is much of what is said in political campaigns, in the daily press, on TV, or over the radio. By reason of the First Amendment—and solely because of it—speakers and publishers have not been threatened or subdued because their thoughts and ideas may be 'offensive' to some.

9 Obscenity law has had a capricious history:

'The white slave traffic was first exposed by W. T. Stead in a magazine article, 'The Maiden Tribute.' The English law did absolutely nothing to the profiteers in vice, but put Stead in prison for a year for writing about an indecent subject. When the law supplies no definite standard of criminality, a judge in deciding what is indecent or profane may consciously disregard the sound test of present injury, and proceeding upon an entirely different theory may condemn the defendant because his words express ideas which are thought liable to cause bad future consequences. Thus musical comedies enjoy almost unbridled license, while a problem play is often forbidden because opposed to our views of marriage. In the same way, the law of blasphemy has been used against Shelley's Queen Mab and the decorous promulgation of pantheistic ideas, on the ground that to attack religion is to loosen the bonds of society and endanger the state. This is simply a roundabout modern method to make heterodoxy in sex matters and even in religion a crime.' Z. Chafee, Free Speech in the United States 151 (1942).

The standard 'offensive' is unconstitutional in yet another way. In Coates v. City of Cincinnati, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214, we had before us a municipal ordinance that made it a crime for three or more persons to assemble on a street and conduct themselves 'in a manner annoying to persons ***46** passing by.' We struck it down, saying: 'If three or more people meet together on a sidewalk or street corner, they must conduct themselves so as not to annoy any police officer or other person who should happen to pass by. In our opinion this ordinance is unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct.

'Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensive normative standard, but rather in the sense that no standard of conduct is specified at all.' Id., at 614, 91 S.Ct., at 1688.

****2627** How we can deny Ohio the convenience of punishing people who 'annoy' others and allow California power to punish people who publish materials 'offensive' to some people is difficult to square with constitutional requirements.

If there are to be restraints on what is obscene, then a constitutional amendment should be the way of achieving the end. There are societies where religion and mathematics are the only free segments. It would be a dark day for America if that were our destiny. But the people can make it such if they choose to write obscenity into the Constitution and define it.

We deal with highly emotional, not rational, questions. To many the Song of Solomon is obscene. I do not think we, the judges, were ever given the constitutional power to make definitions of obscenity. If it is to be defined, let the people debate and decide by a constitutional amendment what they want to ban as obscene and what standards they want the legislatures and the courts to apply. Perhaps the people will decide that the path towards a mature, integrated society requires ***47** that all ideas competing for acceptance must have no censor. Perhaps they will decide otherwise. Whatever the choice, the courts will have some guidelines. Now we have none except our own predilections.

Mr. Justice BRENNAN, with whom Mr. Justice STEWART and Mr. Justice MARSHALL join, dissenting.

In my dissent in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73, 93 S.Ct. 2628, 2642, 37 L.Ed.2d 446, decided this date, I noted that I had no occasion to consider the extent of state power to regulate the distribution of sexually oriented material to juveniles or the offensive exposure of such material to unconsenting adults. In the case before us, appellant was convicted of distributing obscene matter in violation of California Penal Code s 311.2, on the basis of evidence that he had caused to be mailed unsolicited brochures advertising various books and a movie. I need not now decide whether a statute might be drawn to impose, within the requirements of the First Amendment, criminal penalties for the precise conduct at issue here. For it is clear that under my dissent in Paris Adult Theatre, I, the statute under which the prosecution was brought is unconstitutionally overbroad, and therefore invalid on its face. [*] '(T)he transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'' Gooding v. Wilson, 405 U.S. 518, 521, 92 S.Ct. 1103, 1105, 31 L.Ed.2d 408 (1972), quoting ***48** from Dombrowski v. Pfister, 380 U.S. 479, 486, 85 S.Ct. 1116, 1120, 14 L.Ed.2d 22 (1965). See also Baggett v. Bullitt, 377 U.S. 360, 366, 84 S.Ct. 1316, 1319, 12 L.Ed.2d 377 (1964); Coates v. City of Cincinnati, 402 U.S. 611, 616, 91 S.Ct. 1686, 1689, 29 L.Ed.2d 214 (1971); id., at 619—620, 91 S.Ct., at 1690—1691 (White, J., dissenting); United States v. Raines, 362 U.S. 17, 21—22, 80 S.Ct. 519, 522—523, 4 L.Ed.2d 524 (1960); NAACP v. Button, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963). Since my view in Paris Adult Theatre I represents a substantial departure from the course of our prior decisions, and since the state courts have as yet had no opportunity to consider whether a 'readily apparent construction suggests itself as a vehicle for rehabilitating the (statute) in a single prosecution,' Dombrowski v. Pfister, supra, 380 U.S., at 491, 85 S.Ct., at 1123, I ****2628** would reverse the judgment of the Appellate Department of the Superior Court and remand the case for proceedings not inconsistent with this opinion. See Coates v. City of Cincinnati, supra, 402 U.S., at 616, 91 S.Ct., at 1689.

* Cal. Penal Code s 311.2(a) provides that 'Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor.'

All Citations

413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419, 1 Media L. Rep. 1441

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84 S.Ct. 1676
Supreme Court of the United States

Nico JACOBELLIS, Appellant,
v.
STATE OF OHIO.

No. 11.
|
Reargued April 1, 1964.
|
Decided June 22, 1964.

Synopsis

Prosecution for possessing and exhibiting an obscene film. The Court of Common Pleas of Cuyahoga County, Ohio, rendered judgment, and defendant appealed. The Court of Appeals of Cuyahoga County, 115 Ohio App. 226, 175 N.E.2d 123, affirmed, and the record was certified. The Supreme Court of Ohio, 173 Ohio St. 22, 179 N.E.2d 777, affirmed the judgment, and defendant appealed. Mr. Justice Brennan, Mr. Justice Stewart and Mr. Justice Goldberg were of the opinion that the film was not obscene, and Mr. Justice Black and Mr. Justice Douglas were of the opinion that a conviction for exhibiting a film abridges freedom of the press, and the Supreme Court reversed the conviction.

Reversed.

Mr. Chief Justice Warren, Mr. Justice Harlan and Mr. Justice Clark dissented.

West Headnotes (1)

[1] **Constitutional Law**
Obscenity in general
Constitutional Law
Obscenity and lewdness
Obscenity
Possession
Obscenity
Sale, Transportation, or Distribution

92 Constitutional Law
92X First Amendment in General
92X(B) Particular Issues and Applications
92k1172 Sex in General
92k1174 Obscenity in general
(Formerly 92k274.1(3), 92k274(3))
92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)2 Nature and Elements of Crime
92k4502 Creation and Definition of Offense
92k4509 Particular Offenses
92k4509(20) Obscenity and lewdness
(Formerly 92k274.1(3), 92k274(3))
281 Obscenity
281III Publications, Photographs, and Videos
281k158 Photographs and Videos in General
281k161 Possession
281k161(1) In general
(Formerly 281k5.2, 92k274.1(3), 92k274(3))
281 Obscenity
281III Publications, Photographs, and Videos
281k158 Photographs and Videos in General
281k163 Sale, Transportation, or Distribution
281k163(1) In general
(Formerly 281k5.2, 92k274.1(3), 92k274(3))

Ohio conviction for possessing and exhibiting an obscene film was reversed as violative of the First and Fourteenth Amendments. R.C.Ohio § 2905.34; U.S.C.A.Const. Amends. 1, 14.

458 Cases that cite this headnote

Attorneys and Law Firms

****1677** ***185** Ephraim London, New York City, for appellant.

John T. Corrigan, Cleveland, Ohio, for appellee.

Opinion

Mr. Justice BRENNAN announced the judgment of the Court and delivered an opinion in which Mr. Justice GOLDBERG joins.

Appellant, Nico Jacobellis, manager of a motion picture theater in Cleveland Heights, Ohio, was convicted on two counts of possessing and exhibiting an obscene film in

***186** violation of Ohio Revised Code (1963 Supp.), s 2905.34.[1] He was fined $500 on the first count and $2,000 on the second, and was sentenced to the workhouse if the fines were not paid. His conviction, by a court of three judges upon waiver of trial by jury, was affirmed by an intermediate appellate court, 115 Ohio App. 226, 175 N.E.2d 123, and by the Supreme Court of Ohio, 173 Ohio St. 22, 179 N.E.2d 777. We noted probable jurisdiction of the appeal, 371 U.S. 808, 83 S.Ct. 28, 9 L.Ed.2d 52, and subsequently restored the case to the calendar for reargument, 373 U.S. 901, 83 S.Ct. 1288, 10 L.Ed.2d 197. The dispositive question is whether the state courts properly found that the motion picture involved, a French film called 'Les Amants' ('The Lovers'), was obscene and ***187** hence not entitled to the protection for free expression that is guaranteed by the First and Fourteenth Amendments. We conclude that the film is not obscene and that the judgment must accordingly be reversed.

1 'Selling, exhibiting, and possessing obscene literature or drugs for criminal purposes.

'No person shall knowingly sell, lend, give away, exhibit, or offer to sell, lend, give away, or exhibit, or publish or offer o publish or have in his possession or under his control an obscene, lewd, or lascivious book, magazine, pamphlet, paper, writing, advertisement, circular, print, picture, photograph, motion picture film, or book, pamphlet, paper, magazine not wholly obscene but containing lewd or lascivious articles, advertisements, photographs, or drawing, representation, figure, image, cast, instrument, or article of an indecent or immoral nature, or a drug, medicine, article, or thing intended for the prevention of conception or for causing an abortion, or advertise any of them for sale, or write, print, or cause to be written or printed a card, book, pamphlet, advertisement, or notice giving information when, where, how, of whom, or by what means any of such articles or things can be purchased or obtained, or manufacture, draw, print, or make such articles or things, or sell, give away, or show to a minor, a book, pamphlet, magazine, newspaper, story paper, or other paper devoted to the publication, or principally made up, of criminal news, police reports, or accounts of criminal deeds, or pictures and stories of immoral deeds, lust, or crime, or exhibit upon a street or highway or in a place which may be within the view of a minor, any of such books, papers, magazines, or pictures.

'Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not less than one nor more than seven years, or both.'

Motion pictures are within the ambit of the constitutional guarantees of freedom of speech and of the press. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098. But in Both v. United States and Alberts v. California, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498, we held that obscenity is not subject to those guarantees. Application of an obscenity law to suppress a motion picture thus requires ascertainment of the 'dim and uncertain line' that often separates obscenity from constitutionally protected expression. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66, 83 S.Ct. 631, 637, 9 L.Ed.2d 584; see ****1678** Speiser v. Randall, 357 U.S. 513, 525, 78 S.Ct. 1332, 1341, 1342, 2 L.Ed.2d 1460.[2] It has been suggested that this is a task in which our Court need not involve itself. We are told that the determination whether a particular motion picture, book, or other work of expression is obscene can be treated as a purely factual judgment on which a jury's verdict is all but conclusive, or that in any event the decision can be left essentially to state and lower federal courts, with this Court exercising only a limited review such as that needed to determine whether the ruling below is supported by 'sufficient evidence.' The suggestion is appealing, since it would lift from our shoulders a difficult, recurring, and unpleasant task. But we cannot accept it. Such an abnegation of judicial ***188** supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees. Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law. See Roth v. United States, supra, 354 U.S., at 497—498, 77 S.Ct., at 1315—1316 (separate opinion). Such an issue, we think, must ultimately be decided by this Court. Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.' Id., 354 U.S., at 498, 77 S.Ct., at 1316, see Manual Enterprises, Inc. v. Day, 370 U.S. 478, 488, 82 S.Ct. 1432, 1437, 8 L.Ed.2d 639 (opinion of Harlan, J.).[3]

2 It is too late in the day to argue that the location of the line is different, and the task of ascertaining it easier, when a state rather than a federal obscenity law is involved. The view that the constitutional guarantees of free expression do not apply as fully to the States as they do to the Federal Government was rejected in Roth-Alberts, supra, where the Court's single opinion

applied the same standards to both a state and a federal conviction. Cf. Ker v. California, 374 U.S. 23, 33, 83 S.Ct. 1623, 1629, 1630, 10 L.Ed.2d 726; Malloy v. Hogan, 378 U.S. 1, 10—11, 84 S.Ct. 1489, 1494—1495.

3 See Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 708, 79 S.Ct. 1362, 1375, 3 L.Ed.2d 1512 (separate opinion):
'It is sometimes said that this Court should shun considering the particularities of individual cases in this difficult field lest the Court become a final 'board of censorship.' But I cannot understand why it should be thought that the process of constitutional judgment in this realm somehow stands apart from that involved in other fields, particularly those presenting questions of due process. * * *'
See also Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn.L.Rev. 5, 116 (1960): 'This obligation—to reach an independent judgment in applying constitutional standards and criteria to constitutional issues that may be cast by lower courts 'in the form of determinations of fact'—appears fully applicable to findings of obscenity by juries, trial courts, and administrative agencies. The Supreme Court is subject to that obligation, as is every court before which the constitutional issue is raised.'
And see id., at 119:
'It may be true * * * that judges 'possess no special expertise' qualifying them 'to supervise the private morals of the Nation' or to decide 'what movies are good or bad for local communities.' But they do have a far keener understanding of the importance of free expression than do most government administrators or jurors, and they have had considerable experience in making value judgments of the type required by the constitutional standards for obscenity. If freedom is to be preserved, neither government censorship experts nor juries can be left to make the final effective decisions restraining free expression. Their decisions must be subject to effective, independent review, and we know of no group better qualified for that review than the appellate judges of this country under the guidance of the Supreme Court.'

***189** In other areas involving constitutional rights under the Due Process Clause, the Court has consistently recognized its duty to apply the applicable rules of law upon the basis of an independent review of the facts of each case. E.g., Watts v. Indiana, 338 U.S. 49, 51, 69 S.Ct. 1347, 1348, 93 L.Ed. 1801; ****1679** Norris v. Alabama, 294 U.S. 587, 590, 55 S.Ct. 579, 580, 79 L.Ed. 1074.[4] And this has been particularly true where rights have been asserted under the First Amendment guarantees of free expression. Thus in Pennekamp v. Florida, 328 U.S. 331, 335, 66 S.Ct. 1029, 1031, 90 L.Ed. 1295, the Court stated:

4 See also Fiske v. Kansas, 274 U.S. 380, 385—386, 47 S.Ct. 655, 656—657, 7 L.Ed. 1108; Haynes v. Washington, 373 U.S. 503, 515—516, 83 S.Ct. 1336, 1344—1345, 10 L.Ed.2d 513; Chambers v. Florida, 309 U.S. 227, 229, 60 S.Ct. 472, 473—474, 84 L.Ed. 716; Hooven & Allison Co. v. Evatt, 324 U.S. 652, 659, 65 S.Ct. 870, 874, 89 L.Ed. 1252; Lisenba v. California, 314 U.S. 219, 237—238, 62 S.Ct. 280, 290—291, 86 L.Ed. 166; Ashcraft v. Tennessee, 322 U.S. 143, 147—148, 64 S.Ct. 921, 923, 88 L.Ed. 1192; Napue v. Illinois, 360 U.S. 264, 271, 79 S.Ct. 1173, 1178, 3 L.Ed.2d 1217.

'The Constitution has imposed upon this Court final authority to determine the meaning and application of whose words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they * * * are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.'[5]

5 See also Niemotko v. Maryland, 340 U.S. 268, 271, 71 S.Ct. 325, 327, 95 L.Ed. 267; Craig v. Harney, 331 U.S. 367, 373—374, 67 S.Ct. 1249, 1253—1254, 91 L.Ed. 1546; Bridges v. California, 314 U.S. 252, 271, 62 S.Ct. 190, 197—198, 86 L.Ed. 192; Edwards v. South Carolina, 372 U.S. 229, 235, 83 S.Ct. 680, 683, 9 L.Ed.2d 697; New York Times Co. v. Sullivan, 376 U.S. 254, 285, 84 S.Ct. 710, 728—729, 11 L.Ed.2d 686.

We cannot understand why the Court's duty should be any different in the present case, where Jacobellis has ***190** been subjected to a criminal conviction for disseminating a work of expression and is challenging that conviction as a deprivation of rights guaranteed by the First and Fourteenth Amendments. Nor can we understand why the Court's performance of its constitutional and judicial function in this sort of case should be denigrated by such epithets as 'censor' or 'super-censor.' In judging alleged obscenity the Court is no more 'censoring' expression than it has in other cases 'censored' criticism of judges and public officials, advocacy of governmental overthrow, or speech alleged to constitute a breach of the peace.

Use of an opprobrious label can neither obscure nor impugn the Court's performance of its obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments and, in doing so, to delineate the scope of constitutionally protected speech. Hence we reaffirm the principle that, in 'obscenity' cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected. [6]

6 This is precisely what the Court did in Times Film Corp. v. City of Chicago, 355 U.S. 35, 78 S.Ct. 115, 2 L.Ed.2d 72; One, Inc. v. Olesen, 355 U.S. 371, 78 S.Ct. 364, 2 L.Ed.2d 352; and Sunshine Book Co. v. Summerfield, 355 U.S. 372, 78 S.Ct. 365, 2 L.Ed.2d 352. The obligation has been recognized by state courts as well. See, e.g., State v. Hudson County News Co., 41 N.J. 247, 256—257, 196 A.2d 225, 230 (1963); Zeitlin v. Arnebergh, 59 Cal.2d 901, 909—911, 31 Cal.Rptr. 800, 805—806, 383 P.2d 152, 157—158 (1963); People v. Richmond County News, Inc., 9 N.Y.2d 578, 580—581, 216 N.Y.S.2d 369, 370, 175 N.E.2d 681, 681—682 (1961). See also American Law Institute, Model Penal Code, Proposed Official Draft (May 4, 1962), s 251.4(4).

Nor do we think our duty of constitutional adjudication in this area can properly be relaxed by reliance on a 'sufficient evidence' standard of review. Even in judicial review of administrative agency determinations, questions of 'constitutional fact' have been held to require de novo review. Ng Fung Ho v. White, 259 U.S. 276, 284—285, 42 S.Ct. 492, 495, 66 L.Ed. 938; Crowell v. Benson, 285 U.S. 22, 54—65, 52 S.Ct. 285, 293—298, 76 L.Ed. 598.

****1680** ***191** The question of the proper standard for making this determination has been the subject of much discussion and controversy since our decision in Roth seven years ago. Recognizing that the test for obscenity enunciated there—'whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest,' 354 U.S., at 489, 77 S.Ct., at 1311—is not perfect, we think any substitute would raise equally difficult problems, and we therefore adhere to that standard. We would reiterate, however, our recognition in Roth that obscenity is excluded from the constitutional protection only because it is 'utterly without redeeming social importance,' and that '(t)he portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.' Id., 354 U.S., at 484, 487, 77 S.Ct., at 1310. It follows that material dealing with sex in a manner that advocates ideas, Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 79 S.Ct. 1362, 3 L.Ed.2d 1512, or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection. [7] Nor may the constitutional status of the material be made to turn on a 'weighing' of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance. See Zeitlin v. Arnebergh, 59 Cal.2d 901, 920, 31 Cal.Rptr. 800, 813, 383 P.2d 152, 165 (1963). It should also be recognized that the Roth standard requires in the first instance a finding that the material 'goes substantially beyond customary limits of candor in description or representation of such matters.' This was a requirement of the Model Penal Code test that we approved in Roth, 354 U.S., at 487, n. 20, 77 S.Ct., at 1310 and it is explicitly reaffirmed in the ***192** more recent Proposed Official Draft of the Code. [8] In the absence of such a deviation from society's standards of decency, we do not see how any official inquiry into the allegedly prurient appeal of a work of expression can be squared with the guarantees of the First and Fourteenth Amendments. See Manual Enterprises, Inc. v. Day, 370 U.S. 478, 482—488, 82 S.Ct. 1432, 1434—1438 (opinion of Harlan, J.).

7 See, e.g., Attorney General v. Book Named 'Tropic of Cancer,' 345 Mass. 11, 184 N.E.2d 328 (Mass.1962); Zeitlin v. Arnebergh, 59 Cal.2d 901, 31 Cal.Rptr. 800, 383 P.2d 152 (1963).

8 American Law Institute, Model Penal Code, Proposed Official Draft (May 4, 1962), s 251.4(1): 'Material is obscene if, considered as a whole, its predominant appeal is to prurient interest * * * and if in addition it goes substantially beyond customary limits of candor in describing or representing such matters.' (Italics added.)

It has been suggested that the 'contemporary community standards' aspect of the Roth test implies a determination of the constitutional question of obscenity in each case by the standards of the particular local community from which the case arises. This is an incorrect reading of Roth. The concept of 'contemporary community standards' was first expressed by Judge Learned Hand in United States

v. Kennerley, 209 F. 119, 121 (D.C.S.D.N.Y.1913), where he said:

'Yet, if the time is not yet when men think innocent all that which is honestly germane to a pure subject, however little it may mince its words, still I scarcely think that they would forbid all which might corrupt the ****1681** most corruptible, or that society is prepared to accept for its own limitations those which may perhaps be necessary to the weakest of its memberships. If there be no abstract definition, such as I have suggested, should not the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now? * * * To put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by the ***193** necessities of the lowest and least capable seems a fatal policy.

'Nor is it an objection, I think, that such an interpretation gives to the words of the statute a varying meaning from time to time. Such words as these do not embalm the precise morals of an age or place; while they presuppose that some things will always be shocking to the public taste, the vague subject-matter is left to the gradual development of general notions about what is decent. * * *' (Italics added.)

It seems clear that in this passage Judge Hand was referring not to state and local 'communities,' but rather to 'the community' in the sense of 'society at large; * * * the public, or people in general.'[9] Thus, he recognized that under his standard the concept of obscenity would have 'a varying meaning from time to time'—not from county to county, or town to town.

9 Webster's New International Dictionary (2d ed. 1949), at 542.

We do not see how any 'local' definition of the 'community' could properly be employed in delineating the area of expression that is protected by the Federal Constitution. MR. JUSTICE HARLAN pointed out in Manual Enterprises, Inc. v. Day, supra, 370 U.S., at 488, 82 S.Ct., at 1437, that a standard based on a particular local community would have 'the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency. Cf. Butler v. Michigan, 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed.2d 412.' It is true that Manual Enterprises dealt with the federal statute banning obscenity from the mails. But the mails are not the only means by which works of expression cross local-community lines in this country. It can hardly be assumed that all the patrons of a particular library, bookstand, or motion picture theater are residents of the ***194** smallest local 'community' that can be drawn around that establishment. Furthermore, to sustain the suppression of a particular book or film in one locality would deter its dissemination in other localities where it might be held not obscene, since sellers and exhibitors would be reluctant to risk criminal conviction in testing the variation between the two places. It would be a hardy person who would sell a book or exhibit a film anywhere in the land after this Court had sustained the judgment of one 'community' holding it to be outside the constitutional protection. The result would thus be 'to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly.' Smith v. California, 361 U.S. 147, 154, 80 S.Ct. 215, 219, 4 L.Ed.2d 205.

It is true that local communities throughout the land are in fact diverse, and that in cases such as this one the Court is confronted with the task of reconciling the rights of such communities with the rights of individuals. Communities vary, however, in many respects other than their toleration of alleged obscenity, and such variances have never been considered to require or justify a varying standard for application of the Federal Constitution. The Court has regularly been compelled, in reviewing criminal convictions challenged under the Due Process Clause of the Fourteenth Amendment, ****1682** to reconcile the conflicting rights of the local community which brought the prosecution and of the individual defendant. Such a task is admittedly difficult and delicate, but it is inherent in the Court's duty of determining whether a particular conviction worked a deprivation of rights guaranteed by the Federal Constitution. The Court has not strunk from discharging that duty in other areas, and we see no reason why it should do so here. The Court has explicitly refused to tolerate a result whereby 'the constitutional limits of free expression in the Nation ***195** would vary with state lines,' Pennekamp v. Florida, supra, 328 U.S., at 335, 66 S.Ct., at 1031, we see even less justification for allowing such limits to vary with town or county lines. We thus reaffirm the position taken in Roth to the effect that the constitutional status of an allegedly obscene work must be determined on the basis of a national standard.[10] It is, after all, a national Constitution we are expounding.

10 See State v. Hudson County News Co., 41 N.J. 247, 266, 196 A.2d 225, 235 (1963). Lockhart and McClure, note 3, supra, 45 Minn.L.Rev., at 108—112; American Law Institute, Model Penal Code, Tentative Draft No. 6 (May 6, 1957), at 45; Proposed Official Draft (May 4, 1962), s 251.4(4)(d).

We recognize the legitimate and indeed exigent interest of States and localities throughout the Nation in preventing the dissemination of material deemed harmful to children. But that interest does not justify a total suppression of such material, the effect of which would be to 'reduce the adult population * * * to reading only what is fit for children.' Butler v. Michigan, 352 U.S. 380, 383, 77 S.Ct. 524, 526. State and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination. [11] Since the present conviction is based upon exhibition of the film to the public at large and not upon its exhibition to children, the judgment must be reviewed under the strict standard applicable in determining the scope of the expression that is protected by the Constitution.

11 See State v. Settle, 90 R.I. 195, 156 A.2d 921 (1959).

We have applied that standard to the motion picture in question. 'The Lovers' involves a woman bored with her life and marriage who abandons her husband and family for a young archaeologist with whom she has ***196** suddenly fallen in love. There is an explicit love scene in the last reel of the film, and the State's objections are based almost entirely upon that scene. The film was favorably reviewed in a number of national publications, although disparaged in others, and was rated by at least two critics of national stature among the best films of the year in which it was produced. It was shown in approximately 100 of the larger cities in the United States, including Columbus and Toledo, Ohio. We have viewed the film, in the light of the record made in the trial court, and we conclude that it is not obscene within the standards enunciated in Roth v. United States and Alberts v. California, which we reaffirm here.

Reversed.

Mr. Justice WHITE concurs in the judgment.

Opinion of Mr. Justice BLACK, with whom Mr. Justice DOUGLAS joins.

I concur in the reversal of this judgment. My belief, as stated in Kingsley International Pictures Corp. v. Regents, 360 U.S. 684, 690, 79 S.Ct. 1362, 1366, 3 L.Ed.2d 1512, is that 'If despite the Constitution * * * this Nation is to embark on the dangerous road of censorship, * * * this Court is about the most inappropriate Supreme Board of Censors that could be found.' My reason ****1683** for reversing is that I think the conviction of appellant or anyone else for exhibiting a motion picture abridges freedom of the press as safeguarded by the First Amendment, which is made obligatory on the States by the Fourteenth. See my concurring opinions in Quantity of Copies of Books v. Kansas, 377 U.S. 213, 84 S.Ct. 1723; Smith v. California, 361, U.S. 147, 155, 80 S.Ct. 215, 219—220, 4 L.Ed.2d 205; Kingsley International Pictures Corp. v. Regents, supra. See also the dissenting opinion of MR. JUSTICE DOUGLAS ***197** in Roth v. United States, 354 U.S. 476, 508, 77 S.Ct. 1304, 1321, 1 L.Ed.2d 1498, and his concurring opinion in Superior Films, Inc. v. Department of Education, 346 U.S. 587, 588, 74 S.Ct. 286, 98 L.Ed. 329, in both of which I joined.

Mr. Justice STEWART, concurring.

It is possible to read the Court's opinion in Roth v. United States and Alberts v. California, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498, in a variety of ways. In saying this, I imply no criticism of the Court, which in those cases was faced with the task of trying to define what may be indefinable. I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since Roth and Alberts, [1] that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. [2] I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

1 Times Film Corp. v. City of Chicago, 355 U.S. 35, 78 S.Ct. 115, 2 L.Ed.2d 72, reversing 7 Cir., 244 F.2d 432; One, Incorporated v. Olesen, 355 U.S. 371, 78 S.Ct. 364, 2 L.Ed.2d 352, reversing 9 Cir., 241 F.2d 772; Sunshine Book Co. v. Summerfield, 355 U.S. 372, 78 S.Ct. 365, 2 L.Ed.2d 352, reversing 101 U.S.App.D.C.

358, 249 F.2d 114; Manual Enterprises v. Day, 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639 (opinion of HARLAN, J.).

2 Cf. People v. Richmond County News, 9 N.Y.2d 578, 175 N.E.2d 681, 216 N.Y.S.2d 369.

Mr. Justice GOLDBERG, concurring.

The question presented is whether the First and Fourteenth Amendments permit the imposition of criminal punishment for exhibiting the motion picture entitled 'The Lovers.' I have viewed the film and I wish merely to add to my Brother BRENNAN'S description that the love scene deemed objectionable is so fragmentary and fleeting that only a censor's alert would make an audience ***198** conscious that something 'questionable' is being portrayed. Except for this rapid sequence, the film concerns itself with the history of an ill-matched and unhappy marriage—a familiar subject in old and new novels and in current television soap operas.

Although I fully agree with what my Brother BRENNAN has written, I am also of the view that adherence to the principles stated in Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098, requires reversal. In Burstyn MR. JUSTICE CLARK, delivering the unanimous judgment of the Court, said:
'(E)xpression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments. * * *

'To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. * * * Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method ****1684** of expression. Each method tends to present its own peculiar problems. But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule.' Id., 343 U.S., at 502—503, 72 S.Ct., at 781.

As in Burstyn '(t)here is no justification in this case for making an exception to that rule,' id., 343 U.S. at 503, 72 S.Ct., at 781, for by any arguable standard the exhibitors of this motion picture may not be criminally prosecuted unless the exaggerated character of the advertising rather than the obscenity of the film is to be the constitutional criterion.

***199** THE CHIEF JUSTICE, with whom Mr. Justice CLARK joins, dissenting.

In this and other cases in this area of the law, which are coming to us in ever-increasing numbers, we are faced with the resolution of rights basic both to individuals and to society as a whole. Specifically, we are called upon to reconcile the right of the Nation and of the States to maintain a decent society and, on the other hand, the right of individuals to express themselves freely in accordance with the guarantees of the First and Fourteenth Amendments. Although the Federal Government and virtually every State has had laws proscribing obscenity since the Union was formed, and although this Court has recently decided that obscenity is not within the protection of the First Amendment, [1] neither courts nor legislatures have been able to evolve a truly satisfactory definition of obscenity. In other areas of the law, terms like 'negligence,' although in common use for centuries, have been difficult to define except in the most general manner. Yet the courts have been able to function in such areas with a reasonable degree of efficiency. The obscenity problem, however, is aggravated by the fact that it involves the area of public expression, an area in which a broad range of freedom is vital to our society and is constitutionally protected.

1 Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498.

Recently this Court put its hand to the task of defining the term 'obscenity' in Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498. The definition enunciated in that case has generated much legal speculation as well as further judicial interpretation by state and federal courts. It has also been relied upon by legislatures. Yet obscenity cases continue to come to this Court, and it becomes increasingly apparent that we must settle as well as we can the question of what constitutes 'obscenity' and the question ***200** of what standards are permissible in enforcing proscriptions against obscene matter. This Court hears cases such as the instant one not merely to rule upon the alleged obscenity of a specific film or book but to establish principles for the guidance of lower courts and legislatures. Yet most of our decisions since Roth

have been given without opinion and have thus failed to furnish such guidance. Nor does the Court in the instant case—which has now been twice argued before us—shed any greater light on the problem. Therefore, , i consider it appropriate to state my views at this time.

For all the sound and fury that the Roth test has generated, it has not been proved unsound, and I believe that we should try to live with it—at least until a more satisfactory definition is evolved. No government—be it federal, state, or local—should be forced to choose between repressing all material, including that within the realm of decency, and allowing unrestrained license to publish any material, no matter how vile. There must be a rule of reason in this as in other areas of the law and we have attempted in the Roth case to provide such a rule.

****1685** It is my belief that when the Court said in Roth that obscenity is to be defined by reference to 'community standards,' it meant community standards —not a national standard, as is sometimes argued. I believe that there is no provable 'national standard' and perhaps there should be none. At all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one. It is said that such a 'community' approach may well result in material being proscribed as obscene in one community but not in another, and, in all probability, that is true. But communities throughout the Nation are in fact diverse, and it must be remembered that, in cases such as this one, the Court is confronted with the task of reconciling conflicting ***201** rights of the diverse communities within our society and of individuals.

We are told that only 'hard core pornography' should be denied the protection of the First Amendment. But who can define 'hard core pornography' with any greater clarity than 'obscenity'? And even if we were to retreat to that position, we would soon be faced with the need to define that term just as we now are faced with the need to define 'obscenity.' Meanwhile, whose who profit from the commercial exploitation of obscenity would continue to ply their trade unmolested.

In my opinion, the use to which various materials are put —not just the words and pictures themselves—must be considered in determining whether or not the materials are obscene. A technical or legal treatise on pornography may well be inoffensive under most circumstances but, at the same time, 'obscene' in the extreme when sold or displayed to children. [2]

2 In the instant case, for example, the advertisements published to induce the public to view the motion picture provide some evidence of the film's dominant theme: 'When all conventions explode * * * in the most daring love story ever filmed!' 'As close to authentic amour as is possible on the screen.' 'The frankest love scenes yet seen on film.' 'Contains one of the longest and most sensuous love scenes to be seen in this county.'

Finally, material which is in fact obscene under the Roth test may be proscribed in a number of ways—for instance, by confiscation of the material or by prosecution of those who disseminate it—provided always that the proscription, whatever it may be, is imposed in accordance with constitutional standards. If the proceeding involved is criminal, there must be a right to a jury trial, a right to counsel, and all the other safeguards necessary to assure due process of law. If the proceeding is civil in nature, the constitutional requirements applicable in such a case must also be observed. There has been ***202** some tendency in dealing with this area of the law for enforcement agencies to do only that which is easy to do—for instance, to seize and destroy books with only a minimum of protection. As a result, courts are often presented with procedurally bad cases and, in dealing with them, appear to be acquiescing in the dissemination of obscenity. But if cases were well prepared and were conducted with the appropriate concern for constitutional safeguards, courts would not hesitate to enforce the laws against obscenity. Thus, enforcement agencies must realize that there is no royal road to enforcement; hard and conscientious work is required.

In light of the foregoing, I would reiterate my acceptance of the rule of the Roth case: Material is obscene and not constitutionally protected against regulation and proscription if 'to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' 354 U.S., at 489, 77 S.Ct., at 1311. I would commit the enforcement of this rule to the appropriate state and federal courts, and I would accept their judgments made pursuant to the ****1686** Roth rule, limiting myself to a consideration only of whether there is sufficient evidence in the record upon which a finding of obscenity could be made. If there is no evidence in the record upon which such a finding could be made,

obviously the material involved cannot be held obscene. Cf. Thompson v. City of Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654. But since a mere modicum of evidence may satisfy a 'no evidence' standard, I am unwilling to give the important constitutional right of free expression such limited protection. However, protection of society's right to maintain its moral fiber and the effective administration of justice require that this Court not establish itself as an ultimate censor, in each case reading the entire record, viewing the accused material, and making an independent de novo judgment on the question of obscenity. Therefore, ***203** once a finding of obscenity has been made below under a proper application of the Roth test, I would apply a 'sufficient evidence' standard of review—requiring something more than merely any evidence but something less than 'substantial evidence on the record (including the allegedly obscene material) as a whole.' Cf. Universal Camera Corp. v. Labor Board, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456. This is the only reasonable way I can see to obviate the necessity of this Court's sitting as the Super Censor of all the obscenity purveyed throughout the Nation.

While in this case, I do not subscribe to some of the State's extravagant contentions, neither can I say that the courts below acted with intemperance or without sufficient evidence in finding the moving picture obscene within the meaning of the Roth test. Therefore, I would affirm the judgment.

Mr. Justice HARLAN, dissenting.

While agreeing with my Brother BRENNAN'S opinion that the responsibilities of the Court in this area are no different from those which attend the adjudication of kindred constitutional questions, I have heretofore expressed the view that the States are constitutionally permitted greater latitude in determining what is bannable on the score of obscenity than is so with the Federal Government. See my opinion in Roth v. United States, 354 U.S. 476, 496, 77 S.Ct. 1304, 1315, 1 L.Ed.2d 1498; cf. my opinion in Manual Enterprises, Inc. v. Day, 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639. While, as correctly said in MR. JUSTICE BRENNAN'S opinion, the Court has not accepted that view, I nonetheless feel free to adhere to it in this still developing aspect of constitutional law.

The more I see of these obscenity cases the more convinced I become that in permitting the States wide, but not federally unrestricted, scope in this field, while holding the Federal Government with a tight rein, lies the best promise for achieving a sensible accommodation between ***204** the public interest sought to be served by obscenity laws (cf. my dissenting opinion in Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 76, 77, 83 S.Ct. 631, 642, 643, 9 L.Ed.2d 584) and protection of genuine rights of free expression.

I experience no greater ease than do other members of the Court in attempting to verbalize generally the respective constitutional tests, for in truth the matter in the last analysis depends on how particular challenged material happens to strike the minds of jurors or judges and ultimately those of a majority of the members of this Court. The application of any general constitutional tests must thus necessarily be pricked out on a case-by-case basis, but as a point of departure I would apply to the Federal Government the Roth standards as amplified in my opinion in Manual Enterprises, supra. As to the States, I would make the federal test one of rationality. I would not prohibit them from banning any material which, taken as a whole, has been reasonably found in state judicial proceedings ****1687** to treat with sex in a fundamentally offensive manner, under rationally established criteria for judging such material.

On this basis, having viewed the motion picture in question, I think the State acted within permissible limits in condemning the film and would affirm the judgment of the Ohio Supreme Court.

All Citations

378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793, 28 O.O.2d 101

End of Document

From: Madison E. Fantozzi
Sent: Tuesday, February 20, 2018 3:24 PM
To: Angela Garcia Falconetti;Tamara Sakagawa
Subject: Fwd: Request for comment re: FIRE press release on faculty artwork

Sent from my iPhone

Begin forwarded message:

From: Claire McNeill <cmcneill@tampabay.com>
Date: February 20, 2018 at 3:22:26 PM EST
To: "mfantozzi@polk.edu" <mfantozzi@polk.edu>
Subject: Request for comment re: FIRE press release on faculty artwork

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hi Madison,

Just left you a quick voicemail -- hope you're doing well. I'm doing a quick blog post for the Tampa Bay Times about the artwork described in the FIRE press release below. I wanted to reach out to PSC for comment before hitting publish. Please let me know if you all would like to weigh in with a statement or further info beyond what FIRE has included.

I'm available on my cell at 856-371-1536.

Thank you!

Claire

Claire McNeill
Tampa Bay Times
(o) 727-893-8321
(c) 856-371-1536
@clairemcneill

From: Daniel Burnett - FIRE <admin@thefire.org>
Sent: Tuesday, February 20, 2018 11:36 AM
To: Claire McNeill
Subject: 'Too controversial': Polk State College rejects professor's anti-Trump artwork

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Foundation for Individual Rights in Education

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Defending individual rights in higher education.

'Too controversial': Polk State College rejects professor's anti-Trump artwork - FIRE

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Free expression on campus isn't childproofed — except at Polk State College, where part-time faculty member Serhat Tanyolacar's artwork was rejected from a faculty art exhibition for being "too

controversial." In early January, Polk State encouraged all faculty members in its arts program, including Tanyolacar, to submit artwork to a faculty exhibition scheduled to begin on Feb. 12. Tanyolacar submitted a piece titled "Death of Innocence," which depicts several poets and writers juxtaposed with a number of pictures of President Donald Trump and other political figures engaging in sexual activity. Tanyolacar said the art is intended to highlight "moral corruption and moral dichotomy" and provoke debate.

Detail from "Death of Innocence" by Serhat Tanyolacar.

'Too controversial': Polk State College rejects professor's anti-Trump artwork

LAKELAND, Fla., Feb. 20, 2018 — Free expression on campus isn't childproofed — except at Polk State College, where part-time faculty member Serhat Tanyolacar's artwork was rejected from a faculty art exhibition for being "too controversial."

In early January, Polk State encouraged all faculty members in its arts program, including Tanyolacar, to submit artwork to a faculty exhibition scheduled to begin on Feb. 12. Tanyolacar submitted a piece titled "**Death of Innocence**," which depicts several poets and writers juxtaposed with a number of pictures of President Donald Trump and other political figures engaging in sexual activity. Tanyolacar said the art is intended to highlight "moral corruption and moral dichotomy" and provoke debate.

In response to his submission, Polk State Program Coordinator Nancy Lozell informed Tanyolacar on Feb. 6 that his artwork would not be displayed. "After review by the gallery committee and the gallery administrator it was agreed upon that your piece Death of Innocence should not be displayed," Lozell wrote, because the college "offers classes and volunteer opportunities to our collegiate charter high schools and other high schools in Polk county and we feel that that particular piece would be too controversial to display at this time."

FIRE and the **National Coalition Against Censorship** wrote to Polk State President Angela Garcia Falconetti on Feb. 14, **asking the college** to reassess Tanyolacar's submitted artwork in a viewpoint-neutral manner.

"Members of the Polk State campus are not children, and they should not be treated as such," said FIRE Senior Program Officer Sarah McLaughlin. "By sanitizing its campus to shield high school students from 'controversial' material in a faculty art exhibition, Polk State harms members of the college community by needlessly childproofing their campus, and high school students by underestimating their ability to cope with contentious or provocative artwork."

TAKE ACTION: ASK POLK STATE NOT TO CHILDPROOF ITS CAMPUS

In a Feb. 16 meeting, Tanyolacar discussed "Death of Innocence" with Falconetti, Interim Vice President of Academic Affairs Donald Painter, Jr., and Professor of Art Holly Scoggins. The administrators offered shifting justifications for the rejection of the piece, but again made clear that its "controversial" nature played a part in the decision. They reaffirmed that the faculty art exhibition — which opened on Feb. 12 — would not display "Death of Innocence."

"For 'Death of Innocence,' my gallery display strategy is to engage dialogues with both the audience who appreciate the controversial imagery and the audience who may be offended by it," Tanyolacar said. "No artwork should be barred from being exposed to the general audience in any academic institution. As educators and artists we must accept that our students cannot be protected or disconnected from the ideological controversies by the institutionalized moral authority. In fact, controversial artworks are essential to the intellectual growth of our students, and displaying them should be encouraged by both the administration and the faculty."

This is not Tanyolacar's first **campus art controversy**. As a visiting assistant professor at the University of Iowa in 2014, Tanyolacar attempted to spark a debate about racial issues in the United States by placing a piece of public art consisting of newspaper clippings about racial violence printed on a Ku Klux Klan-style robe and hood in an open, outdoor area of campus and engaging with viewers about it. In response to student complaints, UI officials required Tanyolacar to remove the artwork, prompting FIRE and NCAC to call on the university to restate its commitment to freedom of expression.

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

The National Coalition Against Censorship (NCAC), founded in 1974, is an alliance of 56 national nonprofit organizations, including literary, artistic, religious, educational, professional, labor, and civil liberties groups dedicated to promoting the right to free speech.

CONTACT

Daniel Burnett, Communications Manager, FIRE

215-717-3473; media@thefire.org

Foundation for Individual Rights in Education (FIRE)
510 Walnut Street | Suite 1250 | Philadelphia, PA 19106

From: Donald Painter
Sent: Wednesday, February 7, 2018 1:44 PM
To: Holly Scoggins
Cc: Nancy Lozell;April Robinson;Stephen Hull
Subject: Re: Faculty Exhibition

Hi Holly —

Nancy and I had initially discussed. Left you a voicemail. Happy to talk if you want to call me.

Donald

Donald Painter, Jr., Ph.D.
Interim Vice President for Academic Affairs
Polk State College
999 Avenue H, N.E.
Winter Haven, FL 33881
863-292-3605

On Feb 7, 2018, at 1:00 PM, Holly Scoggins <HScoggins@polk.edu> wrote:

Hi All,

Please see email below from adjunct faculty member Serhat Tanyolacar.

Please advise the Gallery Committee how to proceed

From: Serhat Tanyolacar [mailto:serhat@mail.usf.edu]
Sent: Wednesday, February 07, 2018 12:34 PM
To: Holly Scoggins <HScoggins@polk.edu>; Nancy Lozell <NLozell@polk.edu>
Subject: Faculty Exhibition

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Hi Holly,

Am I excluded from the faculty exhibition? I have asked for further explanation from the Gallery Director. However, she has not responded my email yet. I would like to know who were in the Gallery Committee which has given the decision not to display the work. I would still like to display The Death of Innocence, but maybe in another form; in another space. One of the compounds in that work is moral dichotomy, and the Gallery Committee's decision strongly emphasizes that idea.

Also, I am at the Lake Wales campus today. Can I bring art-studio materials/supplies to Lake Wales from Winter Haves to have my class demos?

Thanks,

Serhat

Serhat Tanyolacar
813-846-2692
www.serhattanyolacar.com

From: Nancy Lozell
Sent: Friday, January 26, 2018 1:37 PM
To: Donald Painter;Stephen Hull
Subject: FW: Faculty Exhibition Artwork Request
Attachments: Death of Innocence_Gallery.jpg; Death of Innocence.jpg; Rebuild.jpg

Good afternoon,

The next Gallery Exhibit in the Lakeland Gallery is the Art Faculty Exhibition. Attached you will find some works from Serhat Tanyolacar (adjunct) that he would like to display. The photos of Death of Innocence are rather controversial pieces with quite a bit of sexual content. Please keep in mind that I do have 1-2 high school students that volunteer in the afternoon at the Lakeland Gallery. I am looking for some guidance from both of you so I can proceed with the Gallery Committee and the upcoming gallery show.

Thanks.

Nancy Lozell
Program Coordinator
Arts and College Events
Polk State College
999 Avenue H N.E.
Winter Haven, FL 33881
Office: (863) 297-1050
Email: nlozell@polk.edu

From: Holly Scoggins
Sent: Monday, January 22, 2018 10:04 AM
To: Nancy Lozell
Subject: FW: Faculty Exhibition Artwork Request

Holly Scoggins, MFA
Professor of Art
Polk State College
Hscoggins@Polk.edu
WFA 101A /station 8
863-297-1061 ex 5061

From: Serhat Tanyolacar [mailto:serhat@mail.usf.edu]
Sent: Wednesday, January 03, 2018 6:21 PM
To: Holly Scoggins <HScoggins@polk.edu>
Subject: Re: Faculty Exhibition Artwork Request

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Here are images of two works that I would like to display: Death of Innocence, 2017. 96"x48" and Rebuild, 2017. 42"x24". They are both unique relief engraving prints.
I will have one more work hopefully if I may complete it before February.

On Wed, Jan 3, 2018 at 2:55 PM, Holly Scoggins <HScoggins@polk.edu> wrote:

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>
> Thanks!
>
> Holly Scoggins, MFA
>
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>
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> WFA 101A /station 8
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> 863-297-1061 ex 5061
>
> **From:** Serhat Tanyolacar [mailto:serhat@mail.usf.edu]
> **Sent:** Wednesday, January 03, 2018 2:08 PM
> **To:** Holly Scoggins <HScoggins@polk.edu>
> **Subject:** Re: Faculty Exhibition Artwork Request
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>
> Hi Holly. I hope you fully enjoyed your holliday break. Are we allowed to display controversial works?

Serhat

On Jan 3, 2018 1:41 PM, "Holly Scoggins" <HScoggins@polk.edu> wrote:

Hi Art Faculty,

This is a notice that we will be having a Faculty exhibition on the Lakeland Campus during February and March.

We are asking everyone to submit between 1-5 pieces (depending on the size) for the exhibition.

The artwork should arrive to the Lakeland Gallery no later than FEBRUARY 8TH

If you are doing an installation, you may install between February 5Th-9th. Please let me know the dimensions of the installation ahead of time.

Submit an inventory list to Nancy Lozell nlozell@Polk.edu, no later than February 8th Inventory list should include: Title, Artist name, Materials, Price if for sale, Insurance value (even if it is NFS), dimensions, and your contact info.

If you are shipping work, please ship to:

POLK STATE COLLEGE

ATTN: LTB ART GALLERY- Nancy Lozell

3425 Winter Lake Road
Lakeland, Florida 33803

Exhibit Dates	**Feb. 12- March 16**	**Faculty Art Show**	**Reception: March 1 5-7pm**

Holly Scoggins, MFA

Professor of Art

Polk State College

Hscoggins@Polk.edu

WFA 101A /station 8

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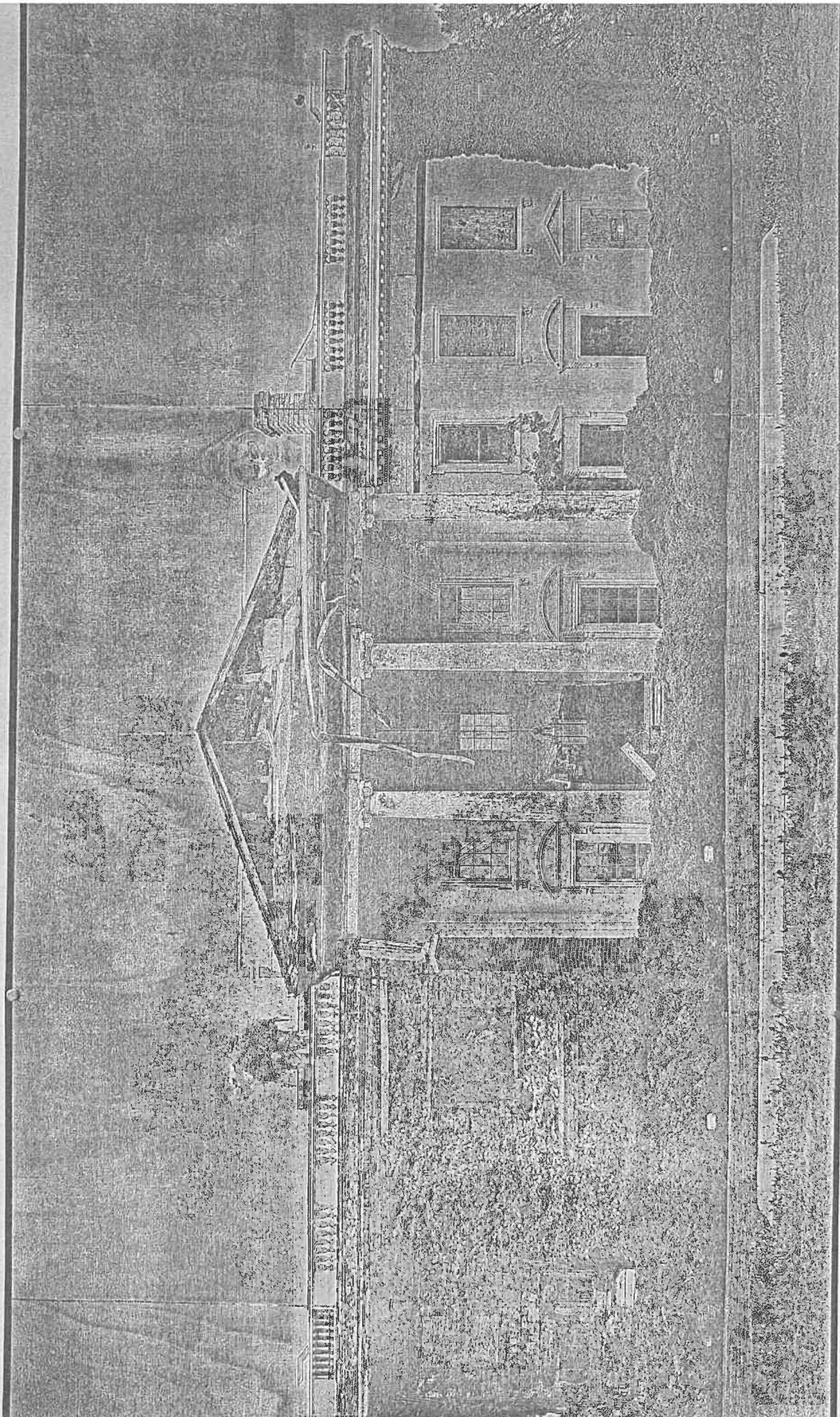

From: Donald Painter
Sent: Friday, January 26, 2018 4:22 PM
To: Nancy Lozell
Cc: Stephen Hull
Subject: Re: Faculty Exhibition Artwork Request

Hi Nancy —

Curious to talk about the normal process for curating the exhibit. Can we discuss on Monday?

Donald

Donald Painter, Jr., Ph.D.
Interim Vice President for Academic Affairs
Polk State College
999 Avenue H, N.E.
Winter Haven, FL 33881
863-292-3605

On Jan 26, 2018, at 1:36 PM, Nancy Lozell <NLozell@polk.edu> wrote:

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Program Coordinator
Arts and College Events
Polk State College
999 Avenue H N.E.
Winter Haven, FL 33881
Office: (863) 297-1050
Email: nlozell@polk.edu

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WFA 101A /station 8
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<Death of Innocence_Gallery.jpg><Death of Innocence.jpg><Rebuild.jpg>

From: Nancy Lozell
Sent: Thursday, February 8, 2018 5:01 PM
To: Donald Painter
Subject: FW: Faculty Exhibition

Below is an email to Holly form Serhat.

From: Serhat Tanyolacar [mailto:serhat@mail.usf.edu]
Sent: Wednesday, February 07, 2018 12:34 PM
To: Holly Scoggins; Nancy Lozell
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Thanks,

Serhat

Serhat Tanyolacar
813-846-2692
www.serhattanyolacar.com

From: Nancy Lozell
Sent: Thursday, February 8, 2018 4:33 PM
To: Donald Painter
Subject: FW: Polk State College Art Faculty Exhibit

FYI

From: Nancy Lozell
Sent: Tuesday, February 06, 2018 1:43 PM
To: Holly Scoggins
Subject: FW: Polk State College Art Faculty Exhibit

Can you offer any more explanation then I did?

Nancy

From: Serhat Tanyolacar [mailto:serhat@mail.usf.edu]
Sent: Tuesday, February 06, 2018 1:39 PM
To: Nancy Lozell
Subject: Re: Polk State College Art Faculty Exhibit

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Good Afternoon,

I would like to have further explanation for your final decision.

Best Regards,

Serhat Tanyolacar

On Feb 6, 2018 1:21 PM, "Nancy Lozell" <NLozell@polk.edu> wrote:

> Good afternoon,
>
> Thank you for your interest in displaying your artwork in the Polk State College Faculty Art Show. After review by the gallery committee and the gallery administrator it was agreed upon that your piece Death of Innocence should not be displayed in the Faculty Art Show. Polk State College offers classes and volunteer opportunities to our collegiate charter high schools and other high schools in Polk county and we feel that that particular piece would be too controversial to display at this time. We would be very happy for you to display some of your other artworks.
>
> Thanks.

Nancy Lozell

Program Coordinator

Arts and College Events

Polk State College

999 Avenue H N.E.

Winter Haven, FL 33881

Office: (863) 297-1050

Email: nlozell@polk.edu

From:	Nancy Lozell
Sent:	Wednesday, February 14, 2018 3:24 PM
To:	Donald Painter
Subject:	FW: Academic Freedom Regarding to the Faculty Exhibition

FYI

From: Serhat Tanyolacar [mailto:serhat@mail.usf.edu]
Sent: Wednesday, February 14, 2018 3:20 PM
To: Holly Scoggins; Nancy Lozell
Subject: Academic Freedom Regarding to the Faculty Exhibition

Dear Holly,

It is difficult to foresee the full-time faculty's reaction, but I am hoping that you will all understand my reasons to demand academic freedom as a higher educational professional and a civil-rights activist.

I have no ill intentions to any faculty member as you have already seen, and I am doing my very best to contribute to the department and for the progress of all my students. I have utter respect to you and the rest of the faculty at the Art Department, and I fully appreciate your continuous support and help.

Along with my academic identity I have activist artist identity, and for over two decades I have defended freedom of speech in various situations both in this country and in Turkey.

This week-most likely Thursday or Friday- Office of the Provost will receive a letter from NCAC, FIRE and AAUP in regards to my rights in freedom of expression and speech in academia. I believe that the piece I wanted to display for the faculty show was absolutely needed for the intellectual growth of the students. When I received the rejection letter from the Gallery Director, stating that the piece was too controversial I questioned my place as a faculty at the Polk State College. I believe that when we accept our students as kids with the mission to protect/isolate them we will defy the purpose of education.

Unfortunately my purposes and my academic existence were dismissed as my work was evaluated by the full-time faculty. I have no fear of facing the controversies relating to my artworks. Probably my biggest fear is being dismissed by my own colleagues in academia. As an educator I have given and sacrificed so much for the future of young generations and I believe that I deserve more respect and understanding especially from my own colleagues. I have been working for a free academia for my entire life by all means and freedom of speech is required to achieve this aim.

In the letter(s) from the freedom of speech organizations there will be a general complaint addressing the academic freedom issues. Therefore there is absolutely no personal condemnation against any individuals at the Polk State College. My mission is to make my work space welcoming and open to all regardless of ideological differences.

I again have to emphasize that I always satisfy my teaching duties, but I take my job more than just teaching. I believe that being educator requires risk taking, and challenging the integrity and moral authority of the

administrative hierarchy from the board of trustees to the dean of academic affairs IF the academic integrity through morality and ethics is under any level of threat.

Respectfully Yours,

Serhat

From: Nancy Lozell
Sent: Friday, February 9, 2018 5:55 PM
To: Donald Painter
Subject: FW: Polk State College Art Faculty Exhibit

Donald,
Please read below

Nancy

From: Serhat Tanyolacar [mailto:serhat@mail.usf.edu]
Sent: Friday, February 09, 2018 5:36 PM
To: Nancy Lozell
Subject: RE: Polk State College Art Faculty Exhibit

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Dear Nancy,

It is very disheartening to see that I am not welcomed nor accepted as a faculty member at Polk State College.

Unfortunately I can not change the way I make art. The entire "appropriateness of art" in contemporary art sounds Medieval and archaic to me. I have asked to the Department Head if I am excluded from the faculty show and i have not even received a response to my inquiry. Is this how the (part-time) faculty valued and respected in a liberal arts environment? We could have find a way to display this work, or any work, but obviously full time faculty do not accept me as an accomplished artist and an activist. Under no circumstances I have never stopped being a poetically, socially and environmentally conscious member of my community.

I accepted to work at Polk State College, not only to teach in extreme hardships. My purpose is always to bring positive social changes into higher education. I have, to be extremely honest, never felt this type of dismissive treatment at any higher education institution where I have worked.

I do not know what else to say at this moment. I will still satisfy my educational duties until the end of this semester but I will openly tell you that this is not the right way to deal with controversial issues. I know that I absolutely deserve better treatment then this as an educator and a community activist.

Regards,

Serhat Tanyolacar

On Feb 9, 2018 2:01 PM, "Nancy Lozell" <NLozell@polk.edu> wrote:

> Dear Serhat,

I apologize for the delay in responding. We very much appreciate your passion for your work and your desire to exhibit in our Faculty Art Show. As mentioned in my e-mail below, the gallery committee, which is comprised primarily of full-time art faculty, has declined to include it in the show.

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I hope this helps to provide a better explanation of our process. I have copied my supervisor, Dr. Donald Painter, Interim Vice President for Academic Affairs, on this reply.

Thanks.

Nancy Lozell

From: Serhat Tanyolacar [mailto:serhat@mail.usf.edu]
Sent: Tuesday, February 06, 2018 1:39 PM
To: Nancy Lozell
Subject: Re: Polk State College Art Faculty Exhibit

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Best Regards,

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Thanks.

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Program Coordinator

Arts and College Events

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Winter Haven, FL 33881

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Office: (863) 297-1050

Email: nlozell@polk.edu

From: Donald Painter
Sent: Friday, February 9, 2018 8:13 PM
To: Stephen Hull
Subject: Re: Polk State College Art Faculty Exhibit

Yes. She's aware as is Don.

thanks!
Donald Painter, Jr., Ph.D.
Interim Vice President for Academic Affairs
Sent from my iPhone

On Feb 9, 2018, at 8:12 PM, Stephen Hull <SHull@polk.edu> wrote:

> Thanks - were you able to give her a quick update on this?
>
> Sent from my iPhone
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> On Feb 9, 2018, at 6:12 PM, Donald Painter <DPainter@polk.edu> wrote:
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>> Donald Painter, Jr., Ph.D.
>> Interim Vice President for Academic Affairs
>> Polk State College
>> 999 Avenue H, N.E.
>> Winter Haven, FL 33881
>> 863-292-3605
>>
>>> Begin forwarded message:
>>>
>>> **From:** Nancy Lozell <NLozell@polk.edu>
>>> **Subject: FW: Polk State College Art Faculty Exhibit**
>>> **Date:** February 9, 2018 at 5:54:47 PM EST
>>> **To:** Donald Painter <DPainter@polk.edu>
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Program Coordinator
Arts and College Events

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From: Don Wilson <DHW@BosDun.com>
Sent: Thursday, February 15, 2018 9:19 AM
To: Tamara Sakagawa
Cc: Donald Painter;Drew Crawford
Subject: RE: Academic Freedom Regarding to the Faculty Exhibition

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Will do.

Donald H. Wilson
Boswell & Dunlap, LLP
245 S. Central Avenue
Bartow, Florida 33830
Phone: 863-533-7117
Fax: 863-533-7412
Cell: 863-698-6198

From: Tamara Sakagawa [mailto:TSakagawa@polk.edu]
Sent: Wednesday, February 14, 2018 5:31 PM
To: Don Wilson
Cc: Donald Painter; Drew Crawford
Subject: RE: Academic Freedom Regarding to the Faculty Exhibition

That's fine.
I will need some talking points to use because we think that this is the type of story that might be of interest should it be shared with the media. I'd like to have our response prepared and cleared by the President in the event that we receive inquiries.
Thx
t

From: Don Wilson [mailto:DHW@BosDun.com]
Sent: Wednesday, February 14, 2018 5:27 PM
To: Tamara Sakagawa <TSakagawa@polk.edu>
Cc: Donald Painter <DPainter@polk.edu>; Drew Crawford <Drew@BosDun.com>
Subject: RE: Academic Freedom Regarding to the Faculty Exhibition

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Drew and I have reviewed the letter and discussed the matter. We do not believe that Mr. Tanyolacar's position presented in the letter has sufficient merit to warrant a "legal" response that attempts to rebut their legal argument and authority. We recommend a polite letter indicating that we disagree with their position and stating that we are not changing our position that the piece is not appropriate for this exhibit. Let's talk tomorrow. Don

Donald H. Wilson
Boswell & Dunlap, LLP
245 S. Central Avenue

Bartow, Florida 33830
Phone: 863-533-7117
Fax: 863-533-7412
Cell: 863-698-6198

From: Tamara Sakagawa [mailto:TSakagawa@polk.edu]
Sent: Wednesday, February 14, 2018 4:35 PM
To: Don Wilson
Cc: Donald Painter
Subject: FW: Academic Freedom Regarding to the Faculty Exhibition

From: Nancy Lozell
Sent: Wednesday, February 14, 2018 4:26 PM
To: Tamara Sakagawa <TSakagawa@polk.edu>
Subject: FW: Academic Freedom Regarding to the Faculty Exhibition

FYI

From: Serhat Tanyolacar [mailto:serhat@mail.usf.edu]
Sent: Wednesday, February 14, 2018 3:20 PM
To: Holly Scoggins; Nancy Lozell
Subject: Academic Freedom Regarding to the Faculty Exhibition

Dear Holly,

It is difficult to foresee the full-time faculty's reaction, but I am hoping that you will all understand my reasons to demand academic freedom as a higher educational professional and a civil-rights activist.

I have no ill intentions to any faculty member as you have already seen, and I am doing my very best to contribute to the department and for the progress of all my students. I have utter respect to you and the rest of the faculty at the Art Department, and I fully appreciate your continuous support and help.

Along with my academic identity I have activist artist identity, and for over two decades I have defended freedom of speech in various situations both in this country and in Turkey.

This week-most likely Thursday or Friday- Office of the Provost will receive a letter from NCAC, FIRE and AAUP in regards to my rights in freedom of expression and speech in academia. I believe that the piece I wanted to display for the faculty show was absolutely needed for the intellectual growth of the students. When I received the rejection letter from the Gallery Director, stating that the piece was too controversial I questioned my place as a faculty at the Polk State College. I believe that when we accept our students as kids with the mission to protect/isolate them we will defy the purpose of education.

Unfortunately my purposes and my academic existence were dismissed as my work was evaluated by the full-time faculty. I have no fear of facing the controversies relating to my artworks. Probably my biggest fear is being dismissed by my own colleagues in academia. As an educator I have given and sacrificed so much for the future of young generations and I believe that I deserve more respect and understanding especially from my

own colleagues. I have been working for a free academia for my entire life by all means and freedom of speech is required to achieve this aim.

In the letter(s) from the freedom of speech organizations there will be a general complaint addressing the academic freedom issues. Therefore there is absolutely no personal condemnation against any individuals at the Polk State College. My mission is to make my work space welcoming and open to all regardless of ideological differences.

I again have to emphasize that I always satisfy my teaching duties, but I take my job more than just teaching. I believe that being educator requires risk taking, and challenging the integrity and moral authority of the administrative hierarchy from the board of trustees to the dean of academic affairs IF the academic integrity through morality and ethics is under any level of threat.

Respectfully Yours,

Serhat

Please Note: Due to Florida's very broad public records law, most written communications to or from College employees regarding College business are public records, available to the public and media upon request. Therefore, this email communication may be subject to public disclosure.

Save a tree - Think before you print this email

From:	Don Wilson <DHW@BosDun.com>
Sent:	Thursday, February 15, 2018 9:18 AM
To:	Donald Painter
Cc:	Drew Crawford;Tamara Sakagawa
Subject:	RE: Academic Freedom Regarding to the Faculty Exhibition

Donald, I did not make myself clear. I agree that the response should come from our office, but I do not think that the issue requires a point by point legal rebuttal. I am thinking if a two hour letter, rather than a three day letter. Let me know when you want to talk. Don

Donald H. Wilson
Boswell & Dunlap, LLP
245 S. Central Avenue
Bartow, Florida 33830
Phone: 863-533-7117
Fax: 863-533-7412
Cell: 863-698-6198

From: Donald Painter [mailto:DPainter@polk.edu]
Sent: Wednesday, February 14, 2018 5:50 PM
To: Don Wilson
Cc: Drew Crawford; Tamara Sakagawa
Subject: Re: Academic Freedom Regarding to the Faculty Exhibition

Hi Don,

Just thinking of history.. I think we prefer a response from you in these matters as it meets the level of seriousness they have engaged in. I'll get Dr. Falconetti's view. But I think that's going to be our preference as they do engage in a legal argument.

thanks!
Donald Painter, Jr., Ph.D.
Interim Vice President for Academic Affairs
Sent from my iPad

On Feb 14, 2018, at 5:31 PM, Tamara Sakagawa <TSakagawa@polk.edu> wrote:

> That's fine.
> I will need some talking points to use because we think that this is the type of story that might be of interest should it be shared with the media. I'd like to have our response prepared and cleared by the President in the event that we receive inquiries.
> Thx
> t
>
> **From:** Don Wilson [mailto:DHW@BosDun.com]
> **Sent:** Wednesday, February 14, 2018 5:27 PM

To: Tamara Sakagawa <TSakagawa@polk.edu>
Cc: Donald Painter <DPainter@polk.edu>; Drew Crawford <Drew@BosDun.com>
Subject: RE: Academic Freedom Regarding to the Faculty Exhibition

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Donald H. Wilson
Boswell & Dunlap, LLP
245 S. Central Avenue
Bartow, Florida 33830
Phone: 863-533-7117
Fax: 863-533-7412
Cell: 863-698-6198

From: Tamara Sakagawa [mailto:TSakagawa@polk.edu]
Sent: Wednesday, February 14, 2018 4:35 PM
To: Don Wilson
Cc: Donald Painter
Subject: FW: Academic Freedom Regarding to the Faculty Exhibition

---

From: Nancy Lozell
Sent: Wednesday, February 14, 2018 4:26 PM
To: Tamara Sakagawa <TSakagawa@polk.edu>
Subject: FW: Academic Freedom Regarding to the Faculty Exhibition

FYI

From: Serhat Tanyolacar [mailto:serhat@mail.usf.edu]
Sent: Wednesday, February 14, 2018 3:20 PM
To: Holly Scoggins; Nancy Lozell
Subject: Academic Freedom Regarding to the Faculty Exhibition

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Dear Holly,

It is difficult to foresee the full-time faculty's reaction, but I am hoping that you will all understand my reasons to demand academic freedom as a higher educational professional and a civil-rights activist.

I have no ill intentions to any faculty member as you have already seen, and I am doing my very best to contribute to the department and for the progress of all my students. I have utter respect to you and the rest of the faculty at the Art Department, and I fully appreciate your continuous support and help.

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Unfortunately my purposes and my academic existence were dismissed as my work was evaluated by the full-time faculty. I have no fear of facing the controversies relating to my artworks. Probably my biggest fear is being dismissed by my own colleagues in academia. As an educator I have given and sacrificed so much for the future of young generations and I believe that I deserve more respect and understanding especially from my own colleagues. I have been working for a free academia for my entire life by all means and freedom of speech is required to achieve this aim.

In the letter(s) from the freedom of speech organizations there will be a general complaint addressing the academic freedom issues. Therefore there is absolutely no personal condemnation against any individuals at the Polk State College. My mission is to make my work space welcoming and open to all regardless of ideological differences.

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Respectfully Yours,

Serhat

Please Note: Due to Florida's very broad public records law, most written communications to or from College employees regarding College business are public records, available to the public and media upon request. Therefore, this email communication may be subject to public disclosure.

Save a tree - Think before you print this email

From: Donald Painter
Sent: Friday, February 9, 2018 1:44 PM
To: Tamara Sakagawa
Subject: Fwd: Follow-Up
Attachments: Email-Nancy to Serhat 2-6-18.pdf; Email-Serhat to Gallery Cmte 2-7-18.pdf; Email-Serhat to Holly 2-7-18.pdf; 180209 v2 Reply from Nancy to Serhat.docx

Donald Painter, Jr., Ph.D.
Interim Vice President for Academic Affairs
Polk State College
999 Avenue H, N.E.
Winter Haven, FL 33881
863-292-3605

Begin forwarded message:

From: Donald Painter <DPainter@polk.edu>
Subject: Follow-Up
Date: February 9, 2018 at 7:53:09 AM EST
To: Don Wilson <DHW@BosDun.com>

Hi Don —

Thank you again for taking the time to talk yesterday. I wanted to share a few of the e-mails with you as well as our proposed response for your review.

The Gallery Committee's decision not to include the artwork was sent to Mr. Tanyolacar by Nancy Lozell, our Arts and Events Coordinator on 2/6/18. I hadn't yet seen this e-mail when we spoke yesterday. It is attached as "Email-Nancy to Serhat 2-6-18."

You'll see where Mr. Tanyolacar replied. He then sent a separate e-mail to Holly that is also attached (Email-Serhat to Holly 2-7-18) as well as an "open letter" to some of the gallery committee members (E-mail-Serhat to Gallery Cmte 2-7-18), which is attached as well. At this point, we have not sent him any additional responses.

Attached is a proposed response for your review. I'm also providing a few links of interest.

https://www.economist.com/news/united-states/21654157-student-safety-has-become-real-threat-free-speech-campus-trigger-unhappy
http://www.thegazette.com/subject/news/university-of-iowa-artist-behind-kkk-statue-discusses-fear-of-art-20150224
http://dailycaller.com/2015/01/06/did-anyone-at-university-of-iowa-apologize-to-serhat-tanyolacar-after-they-got-the-whole-story/

Thank you again for your help.

Donald

Donald Painter, Jr., Ph.D.
Interim Vice President for Academic Affairs
Polk State College
999 Avenue H, N.E.
Winter Haven, FL 33881
863-292-3605

From: Nancy Lozell NLozell@polk.edu
Subject: FW: Polk State College Art Faculty Exhibit
Date: February 8, 2018 at 4:33 PM
To: Donald Painter DPainter@polk.edu

FYI

From: Nancy Lozell
Sent: Tuesday, February 06, 2018 1:43 PM
To: Holly Scoggins
Subject: FW: Polk State College Art Faculty Exhibit

Can you offer any more explanation then I did?

Nancy

From: Serhat Tanyolacar [mailto:serhat@mail.usf.edu]
Sent: Tuesday, February 06, 2018 1:39 PM
To: Nancy Lozell
Subject: Re: Polk State College Art Faculty Exhibit

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Good Afternoon,

I would like to have further explanation for your final decision.

Best Regards,

Serhat Tanyolacar

On Feb 6, 2018 1:21 PM, "Nancy Lozell" <NLozell@polk.edu> wrote:

> Good afternoon,
>
> Thank you for your interest in displaying your artwork in the Polk State College Faculty Art Show. After review by the gallery committee and the gallery administrator it was agreed upon that your piece Death of Innocence should not be displayed in the Faculty Art Show. Polk State College offers classes and volunteer opportunities to our collegiate charter high schools and other high schools in Polk county and we feel that that particular piece would be too controversial to display at this time. We would be very happy for you to display some of your other artworks.
>
> Thanks.
>
> Nancy Lozell
> Program Coordinator
> Arts and College Events

Polk State College
999 Avenue H N.E.
Winter Haven, FL 33881
Office: (863) 297-1050
Email: nlozell@polk.edu

From: **Nancy Lozell** NLozell@polk.edu
Subject: Fw: Open Letter After Polk State College Art Gallery's Decision
Date: February 7, 2018 at 10:45 PM
To: Donald Painter DPainter@polk.edu

Hi Donald,

Just wanted to share this email with you.

Thanks.

Nancy Lozell
Program Coordinator
Arts and College Events
Polk State College
999 Ave. H N.E.
Winter Haven, FL 33881
(863) 297-1050
nlozell@polk.edu

From: Serhat Tanyolacar <serhat@mail.usf.edu>
Sent: Wednesday, February 7, 2018 4:40 PM
To: Holly Scoggins; Nancy Lozell; Andrew Coombs
Subject: Open Letter After Polk State College Art Gallery's Decision

Open Letter to Polk State College:

I am an international artist, socio-political activist, civil rights defender, educator, and autism advocate. I sincerely believe that freedom of speech is an essential part of all civil societies, and that art is one of the most vital acts of free speech available to the civilian. As a professional artist I seek to engage the community with artwork that grapples with difficult socio-political topics. As a consequence, the content of the artwork is open to various interpretations, dependent upon demographics, geo-political locale, current events, and viewer access. In addition, the appeared controversy is an artistic strategy that I only use to engage multiple dialogues over the artwork.

Under certain conditions, art may seem offensive because it often engages and challenges the audience's existing views about sensitive and complex issues such as racism, gender bias, war, climate change, corporate citizenry, or sexual taboos—to name just a few themes pertinent to contemporary art since 1960. Art intends to trigger awareness about our society, an ourselves; it aims to open and develop dialogues about issues we usually avoid in our daily lives. Again, art is not meant to shut down or "close" the conversation; it means to present the audience with an opportunity to think, listen, speak, and learn.

One of biggest challenges in controversial artworks is that artists cannot predict and control the

audience's reactions, or the level of reactions. One solution is to create an artwork that offends no one. (Is this even possible? Are opinions stagnant? Many of our beloved artworks were met with communal disgust when they were first unveiled. Picasso's monumental steel sculpture in Chicago's Daley Plaza and Maya Lin's Vietnam Veterans Memorial are two prime examples.)

Another option is to make art that is purely aesthetical or more like a literal, definitive statement, which might then profess a more straightforward stance on a particular topic. In this case, the work reads more like a slogan or "truism," both of which rarely produce engaging art. Many would define such literalism as propaganda—contemporary advertising assumes a more sophisticated reader. In my own projects, I aim to create fluid and varied discussions, without the artist's (my) authoritative voice or opinion as the default meaning of the work.

With my latest artwork, Death of Innocence, I am aiming to open dialogues over society's moral corruption and our moral dichotomy, which has led an unethical and immoral businessman to be the President of The United States. I fully acknowledge the possible existence of the high school audience at Polk State College Art Gallery. However, censoring a work of art will only erode our primary purpose at this higher-education institution, which is educating the young generations.

Death of Innocence has both conceptual and visual layers, which may make it challenging for the audience to investigate the playfulness of the multiple layer existence. In fact, the representational image is not my artistic intend, but what activates it, and how the image triggers social engagement is.

I am hoping that Polk State College Art Gallery Administration will take this rare opportunity as an important educational moment, and support me to display Death of Innocence during the Faculty Art Show.

Serhat Tanyolacar

From: **Holly Scoggins** HScoggins@polk.edu
Subject: RE: Faculty Exhibition
Date: February 7, 2018 at 1:00 PM
To: Nancy Lozell NLozell@polk.edu
Cc: April Robinson ARobinson@polk.edu, Stephen Hull SHull@polk.edu, Donald Painter DPainter@polk.edu

H

Hi All,

Please see email below from adjunct faculty member Serhat Tanyolacar.

Please advise the Gallery Committee how to proceed

From: Serhat Tanyolacar [mailto:serhat@mail.usf.edu]
Sent: Wednesday, February 07, 2018 12:34 PM
To: Holly Scoggins <HScoggins@polk.edu>; Nancy Lozell <NLozell@polk.edu>
Subject: Faculty Exhibition

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hi Holly,

Am I excluded from the faculty exhibition? I have asked for further explanation from the Gallery Director. However, she has not responded my email yet. I would like to know who were in the Gallery Committee which has given the decision not to display the work. I would still like to display The Death of Innocence, but maybe in another form; in another space. One of the compounds in that work is moral dichotomy, and the Gallery Committee's decision strongly emphasizes that idea.

Also, I am at the Lake Wales campus today. Can I bring art-studio materials/supplies to Lake Wales from Winter Haves to have my class demos?

Thanks,

Serhat

Serhat Tanyolacar
813-846-2692
www.serhattanyolacar.com

Dear Serhat,

I apologize for the delay in responding. We very much appreciate your passion for your work and your desire to exhibit in our Faculty Art Show. As mentioned in my e-mail below, the gallery committee, which is comprised primarily of full-time art faculty, has declined to include it in the show.

I hope you understand that this is a limited exhibit sponsored and presented by Polk State College, and we have an established process for reviewing and selecting the art to be exhibited. Submissions or proposed exhibits are reviewed by the gallery committee, and they make a decision about what pieces to include in a show. Their decision is based on a number of criteria, which include, without intending to set out a complete list of such criteria, the theme of the show, the appropriateness of the piece, the number of pieces that can be displayed based on available space, and the size of individual works.

I hope this helps to provide a better explanation of our process. I have copied my supervisor, Dr. Donald Painter, Interim Vice President for Academic Affairs, on this reply.

Thanks.
Nancy Lozell

From:	Nancy Lozell
Sent:	Wednesday, February 7, 2018 12:59 PM
To:	April Robinson
Cc:	Holly Scoggins
Subject:	Question?
Attachments:	Death of Innocence.jpg; Death of Innocence_Gallery.jpg

Hi April,

I have a question and Holly Scoggins suggested that I call or talk to you in how to handle a situation.
The Faculty Art Show is in the process of being hung in the Lakeland Gallery this week. Serhat Tanyolacar submitted some artwork (attached) that is rather controversial with sexual content. The Gallery Committee feels that it should not be displayed in the Faculty Art Show due to the amount of sexual content. Below is my response that I sent to Serhat on Tuesday (yesterday):

Good afternoon,

Thank you for your interest in displaying your artwork in the Polk State College Faculty Art Show. After review by the gallery committee and the gallery administrator it was agreed upon that your piece Death of Innocence should not be displayed in the Faculty Art Show. Polk State College offers classes and volunteer opportunities to our collegiate charter high schools and other high schools in Polk county and we feel that that particular piece would be too controversial to display at this time. We would be very happy for you to display some of your other artworks.

Below is Serhat's response to me:

Good Afternoon,

I would like to have further explanation for your final decision.

I thought my explanation was adequate. After discussing with Holly today she gave me the following verbiage that might help to explain it better:

" We feel that your work has artistic and political value but the administration and the gallery committee find the sexually explicit nature of some of the images too intense to expose to our High School students. These students are often under the age of 18."

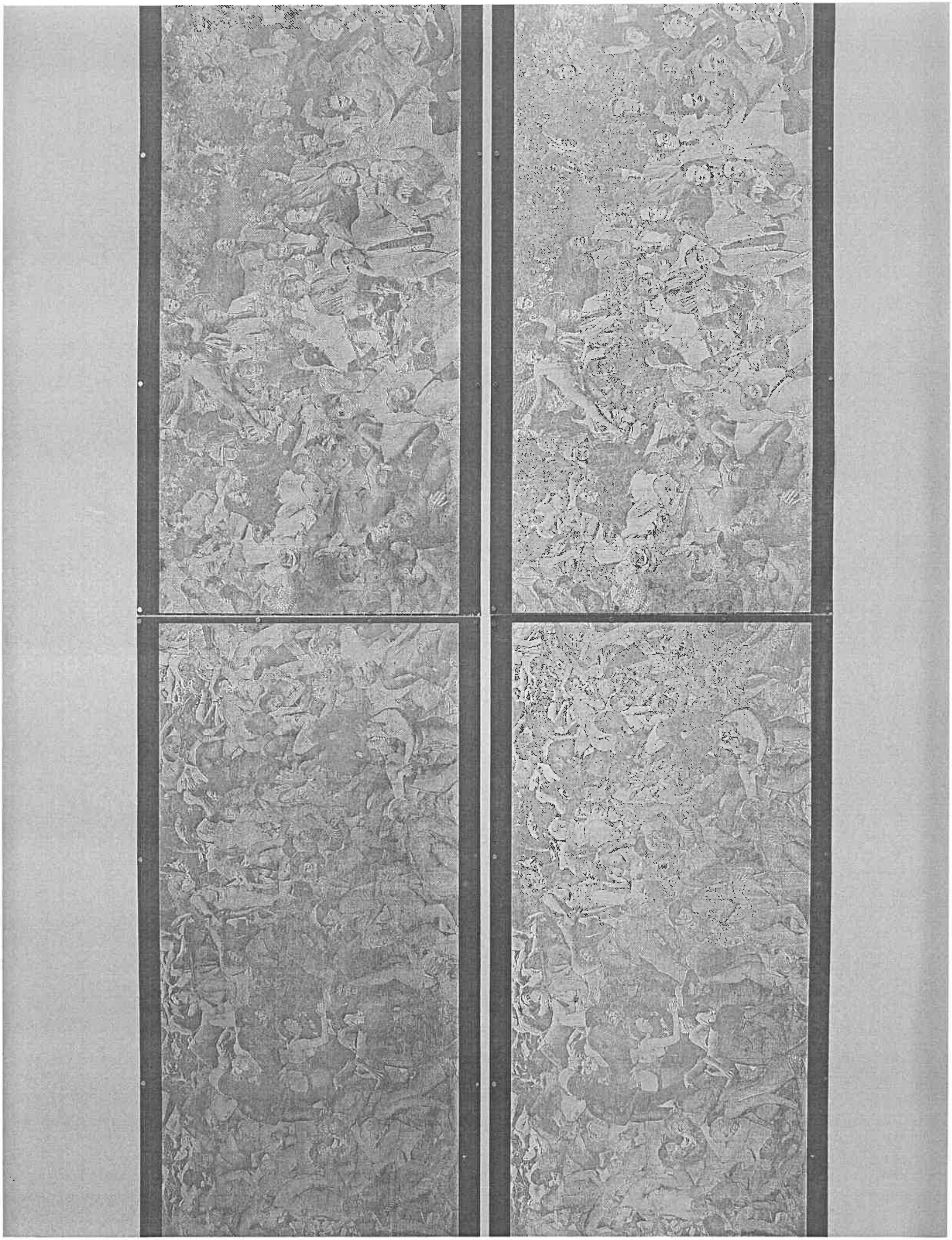
We are looking for either some guidance or a better way to verbalize a response to Serhat.

Can you please contact me so I can respond to Serhat.

Thanks for your assistance.

Nancy Lozell
Program Coordinator
Arts and College Events
Polk State College

999 Avenue H N.E.
Winter Haven, FL 33881
Office: (863) 297-1050
Email: nlozell@polk.edu



From: Tamara Sakagawa
Sent: Friday, February 23, 2018 1:31 PM
To: Angela Garcia Falconetti
Cc: Christine Lee
Subject: FW: FW: The Censorship of "Death of Innocence"

From: Frank Edler [mailto:frankhwedler@gmail.com]
Sent: Friday, February 23, 2018 1:30 PM
To: Tamara Sakagawa <TSakagawa@polk.edu>
Subject: Re: FW: The Censorship of "Death of Innocence"

Dear Tamara,

Thank you for replying. If you don't mind, I'd rather have a response in writing.

Frank

On Fri, Feb 23, 2018 at 7:50 AM, Tamara Sakagawa <TSakagawa@polk.edu> wrote:

> Good morning,
>
> This message was passed to me. Is there a phone number that I can use to reach you?
>
> Thank you,
>
> Tamara
>
> On Thu, Feb 22, 2018 at 3:35 PM, Frank Edler <frankhwedler@gmail.com> wrote:

February 22, 2018

Dear President Falconetti,

I am a free speech advocate, and I am dismayed and saddened to learn that Polk State College decided to censor the artwork of Serhat Tanyolacar entitled "Death of Innocence."

Mr. Tanyolacar was informed on February 6 by Nancy Lozell that his work would not be displayed because the college "offers classes and volunteer opportunities to our collegiate charter high schools and other high schools in Polk county and we feel that that particular piece would be too controversial to display at this time."

As it happens, both reasons lack any merit. The first reason that high school students need to be protected when they come to or attend Polk State College by removing works of art that might offend younger sensibilities not only turns high school students into innocent little lambs who can't cope with a disturbing image, but it also denies all the adult members of your college the chance to experience the work. Why would you let the tail wag the dog? If you feel that strongly about protecting innocent high schoolers, then just deny them access to the exhibition, although this is not a solution I would recommend.

I'm assuming that Polk State College agrees with the AAUP policy paper entitled Academic Freedom and Electronic Communications since it is located at the College's website. The policy explicitly states that "Any policies designed to protect minors must, however, avoid denying materials to adults who have a valid claim of access—a point that every federal court facing this issue has stressed in the course of striking down at least eight state 'harmful to minors on the Internet' laws in recent years."

The second reason given for censoring Mr. Tanyolacar's artwork is that it is "too controversial." Works of art, especially those that make political statements, have nearly always been controversial. Marcel Duchamp's Mona Lisa with a mustache shocked people; Igor Stravinsky's Rite of Spring caused a riot in Paris. Believe me when I say that "Death of Innocence" may shock some people, but it will not cause a riot. The purpose of shock is to get people to think in new and different ways. Controversy should be at the heart of higher education. As Jean Piaget once said, "Education means making creators…You have to make inventors, innovators, not conformists."

Please reconsider the decision to censor Mr. Tanyolacar's artwork.

Sincerely,

Frank Edler, Ph. D.

--

Christopher Finan, Executive Director

National Coalition Against Censorship (NCAC)

19 Fulton St., Suite 407

New York, NY 10038

(212) 807-6242 (office)

(917) 509-0340 (cell)

The National Coalition Against Censorship promotes freedom of thought, inquiry and expression, and opposes all forms of censorship.

POLK STATE COLLEGE

We are Polk.

Tamara Sakagawa

Assoc. VP of Communications and Public Affairs

999 Avenue H, N.E.

Winter Haven FL 33881-4299

863.292.3744 ext. 5359

tsakagawa@polk.edu

From: Colleen Flaherty <colleen.flaherty@insidehighered.com>
Sent: Tuesday, February 20, 2018 6:01 PM
To: Madison E. Fantozzi;Tamara Sakagawa
Subject: media request for today-- on deadline and hoping you can help

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hi Madison and Tamara,

Any comment on this for a short note I'm putting together for Inside Higher Ed?

FIRE
Foundation for Individual Rights in Education

FOR IMMEDIATE RELEASE

FIRE - Defending individual rights in higher education.

www.fire-mail.info

Defending individual rights in higher education.

'Too controversial': Polk State College rejects professor's anti-Trump artwork - FIRE

www.fire-mail.info

Free expression on campus isn't childproofed — except at Polk State College, where part-time faculty member Serhat Tanyolacar's artwork was rejected from a faculty art exhibition for being "too controversial." In early January, Polk State encouraged all faculty members in its arts program, including Tanyolacar, to submit artwork to a faculty exhibition scheduled to begin on Feb. 12. Tanyolacar submitted a piece titled "Death of Innocence," which depicts several poets and writers juxtaposed with a number of pictures of President Donald Trump and other political figures engaging in sexual activity. Tanyolacar said the art is intended to highlight "moral corruption and moral dichotomy" and provoke debate.

Detail from "Death of Innocence" by Serhat Tanyolacar.

'Too controversial': Polk State College rejects professor's anti-Trump artwork

LAKELAND, Fla., Feb. 20, 2018 — Free expression on campus isn't childproofed — except at Polk State College, where part-time faculty member Serhat Tanyolacar's artwork was rejected from a faculty art exhibition for being "too controversial."

In early January, Polk State encouraged all faculty members in its arts program, including Tanyolacar, to submit artwork to a faculty exhibition scheduled to begin on Feb. 12. Tanyolacar submitted a piece titled "Death of

Innocence," which depicts several poets and writers juxtaposed with a number of pictures of President Donald Trump and other political figures engaging in sexual activity. Tanyolacar said the art is intended to highlight "moral corruption and moral dichotomy" and provoke debate.

In response to his submission, Polk State Program Coordinator Nancy Lozell informed Tanyolacar on Feb. 6 that his artwork would not be displayed. "After review by the gallery committee and the gallery administrator it was agreed upon that your piece Death of Innocence should not be displayed," Lozell wrote, because the college "offers classes and volunteer opportunities to our collegiate charter high schools and other high schools in Polk county and we feel that that particular piece would be too controversial to display at this time."

FIRE and the National Coalition Against Censorship wrote to Polk State President Angela Garcia Falconetti on Feb. 14, asking the college to reassess Tanyolacar's submitted artwork in a viewpoint-neutral manner.

"Members of the Polk State campus are not children, and they should not be treated as such," said FIRE Senior Program Officer Sarah McLaughlin. "By sanitizing its campus to shield high school students from 'controversial' material in a faculty art exhibition, Polk State harms members of the college community by needlessly childproofing their campus, and high school students by underestimating their ability to cope with contentious or provocative artwork."

TAKE ACTION: ASK POLK STATE NOT TO CHILDPROOF ITS CAMPUS

In a Feb. 16 meeting, Tanyolacar discussed "Death of Innocence" with Falconetti, Interim Vice President of Academic Affairs Donald Painter, Jr., and Professor of Art Holly Scoggins. The administrators offered shifting justifications for the rejection of the piece, but again made clear that its "controversial" nature played a part in the decision. They reaffirmed that the faculty art exhibition — which opened on Feb. 12 — would not display "Death of Innocence."

"For 'Death of Innocence,' my gallery display strategy is to engage dialogues with both the audience who appreciate the controversial imagery and the audience who may be offended by it," Tanyolacar said. "No artwork should be barred from being exposed to the general audience in any academic institution. As educators and artists we must accept that our students cannot be protected or disconnected from the ideological controversies by the institutionalized moral authority. In fact, controversial artworks are essential to the intellectual growth of our students, and displaying them should be encouraged by both the administration and the faculty."

This is not Tanyolacar's first campus art controversy. As a visiting assistant professor at the University of Iowa in 2014, Tanyolacar attempted to spark a debate about racial issues in the United States by placing a piece of public art consisting of newspaper clippings about racial violence printed on a Ku Klux Klan-style robe and hood in an open, outdoor area of campus and engaging

with viewers about it. In response to student complaints, UI officials required Tanyolacar to remove the artwork, prompting FIRE and NCAC to **call on the university** to restate its commitment to freedom of expression.

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

The National Coalition Against Censorship (NCAC), founded in 1974, is an alliance of 56 national nonprofit organizations, including literary, artistic, religious, educational, professional, labor, and civil liberties groups dedicated to promoting the right to free speech.

Thanks,

Colleen Flaherty
Faculty Correspondent
Inside Higher Ed
1015 18th Street NW, Washington, D.C. 20036/Suite 1100
203.830.9538 (cell)

From: Madison E. Fantozzi
Sent: Wednesday, February 21, 2018 10:06 AM
To: Angela Garcia Falconetti;Tamara Sakagawa
Subject: FW: TIME SENSITIVE

FYI

From: Rachel Frommer [mailto:frommer@freebeacon.com]
Sent: Wednesday, February 21, 2018 10:03 AM
To: Madison E. Fantozzi
Subject: TIME SENSITIVE

Good morning,

Writing from the Washington Free Beacon.

Can Polk State comment on the rejection of artist Serhat Tanyolacar's piece "Death of Innocence" from a faculty art show?

Specifically looking to understand how the rejection of Tanyolacar's for being "too controversial" was not a violation of the First Amendment rights by which Polk State, as a public university, is bound

Does Polk State believe in art censorship?

My deadline on this is 12pm ET.

Best,
Rachel Frommer

From: Tamara Sakagawa
Sent: Thursday, February 15, 2018 11:57 AM
To: Christine F. McHugh;Kyle Drawdy;New Claims;Linda S Green (Miramar)
Cc: Chauncey Fagler;Tony Ganstine;Marsha Hackathorn;Peter Elliott
Subject: RE: PoSC Artist Incident

Already done.
Thank you so much for your assistance.
Tamara

From: Christine F. McHugh [mailto:cmchugh@UE.ORG]
Sent: Thursday, February 15, 2018 11:50 AM
To: Tamara Sakagawa <TSakagawa@polk.edu>; Kyle Drawdy <kdrawdy@fcsrmc.com>; New Claims <newclaims@ue.org>; Linda S Green (Miramar) <LindaS_Green@gbtpa.com>
Cc: Chauncey Fagler <CFagler@fcsrmc.com>; Tony Ganstine <TGanstine@fcsrmc.com>; Marsha Hackathorn <MHackathorn@fcsrmc.com>; Peter Elliott <PElliott@polk.edu>
Subject: RE: PoSC Artist Incident

Sure – please use the contact info to reach out to them directly.

Christine

Christine F. McHugh, Esq.
Senior Resolutions Counsel

United Educators | Prevention and Protection for Education™
240.482.2230 | **cmchugh@ue.org**

From: Tamara Sakagawa [mailto:TSakagawa@polk.edu]
Sent: Thursday, February 15, 2018 11:46 AM
To: Christine F. McHugh <cmchugh@UE.ORG>; Kyle Drawdy <kdrawdy@fcsrmc.com>; New Claims <newclaims@ue.org>; Linda S Green (Miramar) <LindaS_Green@gbtpa.com>
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Subject: Re: PoSC Artist Incident

We'd like like to go with Abernathy
Thx
Tamara

Sent from my T-Mobile 4G LTE Device

-------- Original message --------
From: "Christine F. McHugh" <cmchugh@UE.ORG>

Date: 2/15/18 9:54 AM (GMT-05:00)
To: Kyle Drawdy <kdrawdy@fcsrmc.com>, New Claims <newclaims@ue.org>, "Linda S Green (Miramar)" <LindaS_Green@gbtpa.com>
Cc: Chauncey Fagler <CFagler@fcsrmc.com>, Tony Ganstine <TGanstine@fcsrmc.com>, Marsha Hackathorn <MHackathorn@fcsrmc.com>, Peter Elliott <PElliott@polk.edu>, Tamara Sakagawa <TSakagawa@polk.edu>
Subject: RE: PoSC Artist Incident

Hi Kyle,

Yes, this matter qualifies for ProResponse. The College may select any firm off this list: https://www.ue.org/coverage/crisis-public-relations/ (I've had good experiences with Fleishman-Hillard, which is listed as St. Louis, but they are nationwide), or the College may select a different crisis communications firm as long as they run it by me. Up to $15,000 is pre-approved, with more available with approval.

Please keep me posted on which firm is selected, as UE will pay that vendor directly. Please let me know if you have any questions.

Christine

Christine F. McHugh, Esq.
Senior Resolutions Counsel

United Educators | Prevention and Protection for Education™
240.482.2230 | **cmchugh@ue.org**

From: Kyle Drawdy [mailto:kdrawdy@fcsrmc.com]
Sent: Wednesday, February 14, 2018 9:39 PM
To: Christine F. McHugh <cmchugh@UE.ORG>; New Claims <newclaims@ue.org>; Linda S Green (Miramar) <LindaS_Green@gbtpa.com>
Cc: Chauncey Fagler <CFagler@fcsrmc.com>; Tony Ganstine <TGanstine@fcsrmc.com>; Marsha Hackathorn <MHackathorn@fcsrmc.com>; Peter Elliott <pelliott@polk.edu>; TSakagawa@polk.edu
Subject: PoSC Artist Incident
Importance: High

Christine,

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…images of several poets and writers, including T.S. Eliot and his wife Vivienne Haigh-Wood Eliot, Pablo Neruda and his wife Matilde Urrutia, Woody Guthrie, Jack Kerouac, and Elizabeth Bishop, whose main subjects are love, consciousness, freedom and justice. As juxtaposition, the piece also depicts a number of graphic iterations of President Donald Trump and other political figures engaging in sexual activity. According to Tanyolacar, the artwork is intended to highlight "moral corruption and moral dichotomy" and provoke dialogue.

NCAC also has this incident on their webpage - http://ncac.org/blog/political-artist-excluded-from-faculty-show-at-polk-state-college.

I am requesting that you authorize the crisis communication service within ProResponse to assist PoSC with public relations / media concerns.

If coverage is triggered please forward the PR contact information ASAP.

Thank you.

FCSRMC

Kyle Drawdy, ARM, CIC
Enterprise Risk Management
O: 352.955.2190 x111 | F: 352.955.2069
kdrawdy@FCSRMC.com | www.FCSRMC.com

From: Kyle Drawdy <kdrawdy@fcsrmc.com>
Sent: Wednesday, February 14, 2018 9:39 PM
To: Christine F. McHugh;New Claims;Linda S Green (Miramar)
Cc: Chauncey Fagler;Tony Ganstine;Marsha Hackathorn;Peter Elliott;Tamara Sakagawa
Subject: PoSC Artist Incident
Attachments: FIRE Letter to Polk State College, February 2018.pdf

Importance: High

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

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FCSRMC
FLORIDA COLLEGE SYSTEM RISK MANAGEMENT CONSORTIUM

Kyle Drawdy, ARM, CIC
Enterprise Risk Management
O: 352.955.2190 x111 | F: 352.955.2069
kdrawdy@FCSRMC.com | www.FCSRMC.com

From: Christine F. McHugh <cmchugh@UE.ORG>
Sent: Thursday, February 15, 2018 12:05 PM
To: Tamara Sakagawa
Subject: RE: PoSC Artist Incident

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Great!

Christine F. McHugh, Esq.
Senior Resolutions Counsel

United Educators | Prevention and Protection for Education™
240.482.2230 | **cmchugh@ue.org**

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Sent: Thursday, February 15, 2018 11:57 AM
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Please Note: Due to Florida's very broad public records law, most written communications to or from College employees regarding College business are public records, available to the public and media upon request. Therefore, this email communication may be subject to public disclosure.

Save a tree - Think before you print this email

Polk State College Procedure

Subject	Reference	Date	Number
Art Selection		3/7/11	6050

I. Purpose

To establish a procedure for the selection of art exhibits in Campus Galleries and Arts in Public Places.\

II. Gallery Selection Procedure

A. Solicitation of Artist's Works

Each year, in the Office of Cultural Events will invite artists to submit examples of their work for consideration by a gallery selection jury. Artists who respond within established deadlines with images which are representative of their work will be considered for the following exhibition season.

B. Selection Jury

1. A selection jury will meet each year just to view images and determine which artists will be invited to exhibit their work. This jury shall be comprised of members of the Art faculty and the Coordinator of Cultural Events.

2. Artists whose works are selected for exhibition will be sent a letter of acceptance and a contract which will cover the length of the exhibition period.

3. Artists whose works are not selected for exhibition will be sent a letter of appreciation, and the images submitted will be returned if applicable.

C. Receptions

Artists are permitted to have openings and receptions for their exhibits, and must be arranged through the Development Office. Artists must meet established deadlines in accordance with their contract. Receptions are dependent upon budget availability.

III. Art in Public Places Selection Procedure

The President or his/her designee will work with an identified Arts in Public Places expert to determine art pieces to be displayed publicly on a permanent or long-term basis. Preference shall be given to accomplished Polk county artists. Appropriate agreements shall be signed by the artist/donor as well as College/Foundation leadership to ensure an accurate inventory is maintained and artwork is insured and promoted properly.

Attachments: 1. Visual Artists Contract
2. Art Donation Agreement
3. Art on Loan Agreement
4. Cash Donation for Art Agreement

History: Adopted: 6/27/88, 3/7/11

Distribution: All Holders of PSC Procedures Manual

[signature]	3/7/11	[signature]	3/7/11
Executive Responsible for Procedure	**Date**	**President's Staff Member's Approval**	**Date**
Eileen Holden			3/7/11
President's Approval			**Date**

POLK STATE
COLLEGE

VISUAL ARTISTS CONTRACT

Polk State College invites you to exhibit in its ☐ Winter Haven/ ☐ Lakeland Art Gallery. Exhibition dates are scheduled starting on ____________________________ and ending on ____________________________. Your artwork should be at the Gallery by ____________________________ for installation, and picked up by __________________________ . Other artists who will be exhibiting with you are ____.

TO BE COMPLETED BY THE ARTIST:

As __ person(s) is/are exhibiting his/her/their works in this exhibition, the Artist will need to supply between ___ to ___ medium size pieces. Description of exhibiting artwork (typical sizes, media): ____________________________________

____

CONDITIONS OF CONTRACT

A. PSC takes no commission from the artist. All inquiries of sales will be directed to the Artist.

B. All art in the PSC Gallery will be insured. Art in transit to and from the Gallery cannot be insured by PSC. PSC shall take reasonable and appropriate steps to preserve and protect the art while in the possession of PSC. However, as with any public display, PSC does not warrant or guarantee the safety or condition of the art. The art will be covered generally under PSC's current existing insurance program. The Artist is hereby informed that PSC's insurance program has a deductible of \$5,000.^{00} per item or \$10,000$^{.00}$ per occurrence, and that the valuation of artwork can be a disputed issue with insurance companies. Therefore, should the Artist desire to fully insure his/her art while in possession of PSC, the Artist is hereby notified that it should undertake appropriate steps to provide and acquire such insurance coverage.

C. PSC reserves the right to refuse artwork which is not of the same quality as the representative images presented for selection consideration.

D. Artist is required to have work ready for hanging (with wires) and/or installation. Work deemed too fragile may not be installed.

E. The installation of the show from the works submitted will be at the discretion of the selection jury.

F. Artist is required to keep artwork in the Gallery for full exhibition period indicated above.

G. When delivering art for installation, the artist should supply a typed list containing title(s), media, insurance value and sales price. Each piece of artwork should be labeled appropriately for accurate identification. If a work is not for sale, indicate "NFS".

H. The Artist will be responsible for any and all freight and transportation charges for artwork, to and from the Gallery.

I. The College and/or Foundation is proud to host an opening reception with light refreshments budgets permitting. If the Artist desires a reception, he/she **must inform PSC one month or earlier prior to their show:**

1) set a date for the reception that is mutually agreeable with the Artist(s) or their representative(s) and College/Foundation leadership.
2) get high resolution images that will be used for the invitation to the Cultural Events Coordinator.
3) send any addresses and contact names to Cultural Events Coordinator that should be included in the invitation mailing.

J. Other conditions: ____

____

The above conditions are binding to Polk State College and the exhibiting Artist(s). Failure to comply with these conditions will result in immediate cancellation of the agreement and the College will be held harmless of damages.

Your participation is greatly appreciated. We look forward to working with you and exhibiting your work(s).

SIGNATURES:

______________________ Artist	____________ Date	____________________ For Polk State College	____________ Date
______________________ Address	____________ City, ST Zip	Return three (3) originals to: **Cultural Events** **Polk State College** **999 Avenue H, Northeast** **Winter Haven, FL 33881**	
____________ Phone	____________ E-mail		

Originals with signatures to: ☐ PSC Business Office ☐ PSC Cultural Events ☐ Artist